IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Plaintiff,

vs.

RUFF N'READY UNDERWEAR CO., INC., a Vermont Corporation, and JACK SHIPLEY, individually and as Administrator of the Estate of KAY SHIPLEY, Deceased,

Defendants.

77-C-201-B

ORDER

The Court has for consideration the following:

1. Plaintiff's Motion for Default Judgment against the defendant, Ruff N' Ready Underwear Co., Inc.;

2. Defendant Shipley's Motion for Summary Judgment and Motion to Dismiss Plaintiff's Request for Default Judgment;

3. Defendant Shipley's Motion for Stay of Judgment and Motion for Additional Enlargement of Time to Stay Judgment and for Permission to Supplement Arguments, Brief, and to File Affidavit of Carol Braden Schofield;

4. Application of Aberson's Alley to Intervene as Party Defendant;

5. Plaintiff's Motion for Summary Judgment against Defendant, Shipley.

The above Motions were orally argued before the Magistrate on February 6, 1978, and March 20, 1978.

Thereafter, the Magistrate filed his Findings and Recommendations, and the defendant, Shipley, filed his objections and Aberson's Alley filed its objections.

Additionally, the defendant, Shipley, filed an Application for Additional Enlargement of Time to Submit Brief and

Deposition and Plaintiff responded thereto on April 19, 1978. Defendant, Shipley, on April 20, 1978, filed a Notice to Take Deposition, and said Deposition was taken and was filed in this Court on May 30, 1978.

This is a declaratory judgment action brought pursuant to the provisions of Title 28 U.S.C. §2201. Plaintiff is a corporation organized and existing under the laws of Connecticut, with its principal place of business in Hartford, Connecticut. The defendant, Ruff N'Ready Underwear Co., Inc. is and was a corporation organized under the laws of the State of Virginia, with its principal place of business at Whitingham, Vermont. The defendant, Shipley, is an individual and citizen of the State of Oklahoma and he is also the Administrator of the Estate of Kay Shipley, Deceased, whose death occurred in Tulsa, Oklahoma, on or about March 27, 1976. The controversy involves an amount in excess of $10,000.00, exclusive of interest and costs.

Plaintiff issued its policy or contract of insurance number 02C349357 to the defendant, Ruff N' Ready, for a policy term extending to May 30, 1975, which policy was thereafter cancelled effective May 14, 1975, at the request of Ruff N'Ready.

On January 8, 1976, decedent, Kay Shipley, sustained certain injuries when a certain robe or coat manufactured by the defendant, Ruff N' Ready, allegedly caught fire, causing injuries which thereafter resulted in her death on March 27, 1976.

The policy of insurance, which is the subject matter of this litigation, contained the following pertinent definitions:

> "'occurrence' means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured;
>
> "'bodily injury' means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."

By this declaratory judgment action, plaintiff contends that under the clear language and definitions of its policy, coverage could not extend to the consequences of an accident which occurred January, 1976, or approximately eight months after the policy expired. Defendant, Shipley, on the other hand, contends that the policy is ambiguous and that the manufacture or sale of the product within the policy dates should be construed or held to be an accident for purposes of coverage, even though the actual accident and bodily injury did not occur until a later date subsequent to the expiration of the policy.

Both parties, i.e., plaintiff and the defendant, Shipley, have filed and argued motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and both of them contend a right to judgment as a matter of law.

The Magistrate found at page 3 of his Findings and Recommendations:

> "Various motions for additional time or enlargment of time have been filed by Defendant Shipley, as follows; motion filed November 2, 1977, extending time thirty days for response to Plaintiff's motion for default judgment against Defendant Ruff N' Ready; motion filed November 23, 1977, asking fifteen days additional extension; motion for additional enlargement of time and for permission to supplement Defendant Shipley's motion for summary judgment filed on or about December 12, 1977; motion filed on or before February 14, 1978, for stay of judgment (decision on summary judgment) and for permission to supplement oral arguments; motion filed on or about February 24, 1978, for additional enlargment of time to obtain deposition and supplement argument (which motion was previously granted by the Court with no further extensions to be granted); and motion filed on March 20, 1978, for additional enlargment of time and to stay judgment and for permission to supplement arguments, brief, and file affidavit. ***."

On April 4, 1978, the Magistrate filed his Findings and Recommendations, wherein he recommended as follows:

> "Defendant Shipley's motion for summary judgment and motion to dismiss Plaintiff's request for default judgment against Defendand Ruff N' Ready should be overruled;
>
> "Defendant Shipley's motion for additional enlargement of time and to stay judgment and for permission to supplement arguments, brief, and file affidavit of Carol Braden Schofield, should be denied;

"Defendant Shipley's motion for stay of judgment should be denied;

"The application of Aberson's Alley to intervene as party defendant should be denied; and

"Plaintiff's motion for summary judgment should be sustained."

Thereafter, and on April 12, 1978, defendant, Shipley, filed his Objection to the Findings and Recommendations of the Magistrate.

On April 14, 1978, Aberson's Alley filed an objection to the recommendation of the Magistrate that it not be allowed to intervene.

The Court will first consider the objection raised by Aberson's Alley. In its application to intervene, Aberson's Alley states that Jack Shipley, one of the defendants in this litigation, has instituted an action against Aberson's Alley and Ruff N' Ready Underwear in the District Court of Okmulgee County, Oklahoma. In that complaint it is alleged that Aberson's Alley sold to the Shipleys, plaintiffs in the Okmulgee action, certain garments and that these garments were purchased from Ruff N' Ready Underwear. Plaintiffs further allege in the Okmulgee action that the garment was defective, dangerous and caused the death of Kay Shipley.

Aberson's Alley, therefore, contends that if a judgment were rendered against it in the District Court of Okmulgee County, it would have a right of indemnity and a cause of action over and against Ruff N' Ready Underwear since that garment was purchased by Aberson's Alley from Ruff N'Ready Underwear.

The application to intervene was filed by Aberson's Alley on January 3, 1978. Defendant, Shipley's Motion for Summary Jugment was filed December 12, 1977; Plaintiff's Motion for Summary Judgment was filed December 20, 1977.

In the original brief filed by Aberson's Alley in support of its application to intervene, it states that it seeks leave to intervene pursuant to Rule 24A of the Federal Rules of

Civil Procedure, which provides:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect the interest, unless the applicant's interest is adequately represented by existing parties."

Aberson's Alley further stated: "It is further respectfully submitted that this application will not unduly delay or prejudice the adjudication of the rights of the original parties to this action and this Court may in its discretion under Rule 24B allow the application and permit the intervention."

Rule 24(B) provides:

> "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law of fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the acrion. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

In his Findings and Recommendations, the Magistrate found:

> "By its application seeking intervention, Aberson's Alley requests permissive intervention under Rule 24(b), Federal Rules of Civil Procedure, however, it is noted said applicant does not come within the catagories specified in Rule 24(b). As provided in said rule, the court shall consider whether intervention will unduly delay or prejudice adjudication of the rights of the original parties, and here, both Plaintiff and Shipley had motions for summary judgments pending whenever the application of Aberson's Alley was filed. Therefore, intervention would unduly prejudice or delay the adjudication of the rights of the original parties, including plaintiff's adjudication as to Defendant Ruff N' Ready, who is in default."

Turning first to Intervention pursuant to Rule 24(A) of the Federal Rules of Civil Procedure, the Tenth Circuit said in Natural Resources Defense Council, Inc., etc. v. United States Nuclear Regulatory Commission, et al. (Nos. 77-1996 and 78-1069, Tenth Circuit, decided June 15, 1978) it is stated:

> "Our issue is a limited one. We merely construe and weigh Rule 24(a) of the Fed.R.Civ.P. (intervention as of right) and decide in light of the facts and considerations presented whether the denial of intervention was correct. ***.
>
> "We do not have a subsection (1) situation involving a statutory conferring of right to intervene. Accordingly, we must consider the standards set forth in subsection (2), which are:
>
> "1. Whether the applicant claims an interest relating to the property or transaction which is the subject of the action.
>
> "2. Whether the claimants are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest.
>
> "3. Whether their interest is not adequately represented by existing partied."

Further in construing and interpreting interedt in relationship to the second criteria in Rule 24(a)(2) the Tenth Circuit said:

> "Kerr-McGee argues that the meaning of interest is one which, if they do not prevail in the intervention, threatens them with a disposition of the action which may, as a practical matter, impair or impede their efforts to protect the interest. Thus, we are asked to interpret interest in relationship to the second criterion in Rule 24(a)(2), impairment or impeding ability to protect the interest.
>
> "The Supreme Court has said that the interest must be a significantly protectable interest. See Donaldson v. United States, 400 U.S. 517 (1971). The Supreme Court held that a taxpayer did not have a right to intervene in a judicial enforcement proceeding seeking issuance of an Internal Revenue summons ordering production of business records of his employer. The narrowness of the summons proceeding was noted, and it was said that an objection of the taxpayer could be raised at the proper time in a subsequent trial.
>
> "Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135-36 (1967), held that the interest claimed by the applicant in intervention did not have to be a direct interest in the property or transaction at issue provided that it was an interest that would be impaired by the outcome. There Cascade's source of supply would have been a new company created by an anti-trust divestiture, a significant change. In view of this consequence of the litigation, it was held that Cascade

had a sufficient interest. See also Allard v. Frizzell, 536 F.2d 1332, 1334 n.1 (10th Cir. 1976). (Judge Holloway concurring in the result). ***."

The Circuit Court went on to say:

"The next question is whether, assuming the existence of an interest, the chance of impairment is sufficient to fulfill the requirement of Rule 24(a)(2).

"As already noted, the question of impairment is not separate from the question of existence of an interest. ***.

"It should be pointed out that the Rule refers to impairment 'as a practical matter.' Thus, the court is not limited to consequences of a strictly legal nature. The court may consider any significant legal effect in the applicant's interest and it is not restricted to a rigid res judicata test. Hence, the stare decisis effect might be sufficient to satisfy the requirement. See New York Public Interest Research Group, Inc. v. Regents of the University of New York, 516 F.2d 350, 352 (2d Cir.1975) ***."

The Court went on to say as to adequate representation: "We have held in accordance with Trbovich v. UMW, 404 U.S. 528, 538 n.10 (1972), that the burden continues to be on the petitioner or movant in intervention to show that the representation by parties may be inadequate."

The Court finds, based on the information before it, that Aberson's Alley may not avail itself of Rule 24(A) for "Intervention of Right".

Turning to Rule 24(B) of the Federal Rules of Civil Procedure, Plaintiff contends that Aberson's Alley is not entitled to permissive intervention under this rule. Plaintiff argues that the only interest alleged by Aberson's Alley is that "it has an interest in the litigation by reason of a possibility that it might, in the future, have a claim for indemnity against the Defendant, Ruff N'Ready." Plaintiff states that that claim would only materalize in the event that it was established by the State Court litigation on the defective product that the product sold to Aberson's Alley and later sold by it to Shipley was defective.

Plaintiff states:

"Plaintiff suggests that applicant does not qualify for permissive intervention under either of the two provisions or conditions which authorize permissive

> intervention as specified in the Rule itself, nor does Aberson's show a direct, legal protectible, present interest in this litigation."

It is the argument of the plaintiff that the main action in this litigation to be determined by declaratory judgment is whether a certain accident and bodily injury policy provides coverage for injuries allegedly occurring within the stated policy term when the policy had allegedly expired when the injury occurred. Plaintiff contends that Aberson's potential claim against Ruff N'Ready for possible indemnification will remain the same regardless of whether Plaintiff's policy was applicable to protect Ruff N'Ready or not. Plaintiff further contends that there is no contractual relationship with Plaintiff and Aberson's is not legally an adverse party to plaintiff, and, thus, Aberson's should have no status to intervene. Plaintiff further contends that the presence of Aberson's Alley in this case would conceivably delay determination of the controversy between the existing parties, as a Motion for Default Judgment against Ruff N'Ready is pending for decision and also Motions for Summary Judgment as to Plaintiff and Defendant Shipley.

Plaintiff, in its brief, as to the objections filed, adopts its prior arguments and states:

> "*** Aberson's simply does not qualify for permissive intervention under Rule 24(B), nor does it have and show a 'substantial, direct and legally protectable, present interest in the relief sought' as would be required for its intervention under 22 Am.Jur.2nd (Declaratory Judgments) Section 11, Page 849. There is no present issue between Aberson's Alley and Hartford, the Plaintiff herein. At best, Aberson's merely says that it has or could have a claim for indemnification against Defendant Ruff N'Ready. The same claim exists regardless of the outcome of this lawsuit which is brought to determine that under the clear language of its policy Plaintiff provides no insurance to Ruff N'Ready which is applicable to Shipley's claim against Ruff N'Ready. Abersons is not a party to the insurance contract between Plaintiff and Ruff N'Ready. Aberson's Legal position against Ruff N'Ready is the same, whether it has insurnance with Hartford, with some other company, or no insurance."

Aberson's Alley contends in its brief that until recently the retail seller of the garment would only have been a joint tort feasor with the manufacturer, Ruff N'Ready, and "arguably would hve no interest in whether or not such co-defendant had

insurance or not, as obviously there was no immediate right of contribution between joint tort feasors under Oklahoma law."

Aberson's Alley states:

> In recent years, Oklahoma has now adopted in such product cases 'manufacturers product liability' which has allowed all persons in the chain of commerce of a given product to be exposed to the Plaintiff's claims regardless of their direct fault. In such manufacturers' warranty actions the law also granted the right of those in the chain of commerce to demand and secure indemnity from the manufacturer or that one in the chain who actively was at fault for a bad product.
>
> "This retailer, Aberson's Alley, having direct exposure to Plaintiff for alleged defects in the manufacture of a certain garment, has a present right to demand that Ruff N'Ready, the manufacturer, assume our defense or be liable for our exposure as well as expenses of our defense. ***."

The Magistrate found and recommended:

> "By its application seeking intervention, Aberson's Alley requests permissive intervention under Rule 24(b), Federal Rules of Civil Procedure; however, it is noted said applicant does not come within the catagories specified in Rule 24(b). As provided in said rule, the Court shall consider whether intervention will unduly delay or prejudice adjudication of the rights of the original parties, and here, both Plaintiff and Shipley had motions for summary judgments pending whenever the application of Aberson's Alley was filed. Therefore, intervention would unduly prejudice or delay the adjudication of the rights of the original parties, including Plaintiff's adjudication as to Defendant Ruff N'Ready, who is in default."

It is stated in Wright & Miller, Federal Practice and Procedure, Volume 7A, §1911:

> "The rule does not specify any particular interest that will suffice for permissive intervention and, as the Supreme Court has said, it 'plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.' Indeed it appears that the intervenor-by-permission does not even have to be a person who would have been a proper party at the beginning of the suit, since of the two tests for permissive joinder of parties, a common question of law or fact and some right to relief arising from the same transaction, only the first is stated as a limitation on intervention.
>
> "Permissive intervention may be permitted when the intervenor has an economic interest in the outcome of the suit.***
>
> "***The concept of a common question of law or fact is one that appears in a number of the rules in addition to Rule 24(b)(2). It has not been a difficult concept

to apply in other contexts and it should not be here. If the would-be intervenor's claim or defense contains no question of law or fact that is raised also by the main action, intervention under this branch of the rule must be denied. If there is a common question of law or fact, the requirements of the rule has been satisfied and it is then discretionary with the court whether to allow intervention. ***."

In Spangler v. Pasadena City Bd. of Ed. (9th Cir. 1977) 552 F.2d 1326, 1329 it is said:

"Where a party may not intervene as a matter of right, the trial court may consider whether permissive intervention is appropriate. Although a district court's discretion in this regard is broad, it is nevertheless subject to review on appeal. United States v. Board of School Commissioners, 466 F.2d 573, 576 (7th Cir. 1972). If the trial court determines that the initial conditions for permissive intervention under rule 24(b)(1) or 24(b)(2) are met, it is then entitled to consider other factors in making its discretionary decision on the issue of permissive intervention. These relevant factors include the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case. The court may also consider whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlaying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. ***."

Although the opinion in the case of Sears, Roebuck and Co. v. Zurich Insurance Company (7th Cir. 1970) 422 F.2d 587, is directed at the propriety of the dismissal of a declaratory judgment action by the lower Court, the relevant facts stated therein and the comments of the Court are of some aid to the question presently pending before this Court. In the Sears case, the District Court dismissed, sua sponte, a diversity declaratory judgment action instituted by Sears, Roebuck and Co. against Zurich Insurance Company. Sears had been sued in State Court by the Malones, and that suit was subsequently removed to Federal Court. The Malones contended that a television set purchased by them from Sears exploded and burned. The television set was manufactured by Warwick Electronics, Inc., who was insured by Zurich. The Malones alleged that the set had been defectively manufactured by Warwick and improperly serviced by Sears.

The allegations of improper service were exclusions in the Zurich policy for which Zurich was not liable. Neither Zurich nor Warwick were parties to the Malone action. Zurich refused to defend on behalf of Sears in the Malone suit. Sears brought the declaratory judgment action seeking a declaration of its rights under the policy of insurance issued by Zurich to Warwick and extended to Sears by vendors endorsement.

The Court said at page 588:

> "An immediate and actual controversy between Sears and Zurich exists in this case. Specifically at issue in the Illinois litigation are the questions of whether Zurich is obligated to defend on behalf of Sears ***."

On page 589 the Court said:

> "The question of an insurance company's duty to defend plainly presents a present controversy ripe for declaratory relief (citing cases) *** In that case, the insurance company was precluded under Illinois law to raise the question of its policy coverage in the state suit which the insurance company claimed it did not have to defend. The case at bar is analogous. Zurich is not a party to the Malone action and accordingly is not able to raise the question of its policy coverage in that suit. It is raising here those issues which will not be treated in the Malone action---truly a case ripe for declaratory relief."

The Court believes that this case is distinguishable from the case at bar because of the policy language involved. This is the only case that this Court has been able to find dealing with products liability and insurance, but it does not meet the issue on all fours to substantiate Aberson's Alley's position in the instant litigation.

Turning to the question of "timeliness of the motion to intervene" the Fifth Circuit said in McDonald v. E. J. Lavino Co. (5th Cir.1970) 430 F.2d 1065:

> "'Timeliness' is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice."

In the instant case, plaintiff and the defendant, Shipley, had filed their respective Motions for Summary Judgment at the time intervention was sought. The defendant, Ruff N'Ready, was already in default. The case was in a position where a dispositive ruling could be made by the Court.

Additionally, in view of the Court's decision to be hereinafter made as to the Motions for Summary Judgment, the only question for determination by this Court is a question of law.

The Court, after applying all of the criteria for permissive intervention under Rule 24(B) finds that Aberson's Alley has not sustained the burden and should not be allowed to intervene in this action.

IT IS, THEREFORE, ORDERED that the objection of Aberson's Alley and the defendant, Shipley, as to the Findings and Recommendations of the Magistrate on the Motion to Intervene are overruled.

IT IS FURTHER ORDERED that the Motion to Intervene filed by Aberson's Alley be and the same is overruled..

The Court will now consider the Motions for Summary Judgment filed by the plaintiff and the defendant, Shipley.

First, the mere fact that both parties seek summary judgment does not constiute a waiver of a full trial or the right to have the case presented to a jury. Volume 10, Wright & Miller, §2620.

The policy provisions in question in this litigation are reflected on page 2 of this Order.

For easy reference the Court will quote them once again, with the arguments propounded by plaintiff and defendant, Shipley, as to the rational as to why each Motion for Summary Judgment should be sustained.

The policy of insurance contains the following pertinent definitions:

"'occurrence' means an accident, including contin-

uous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured;

"'bodily injury' means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."

Plaintiff contends that under the clear language and definitions of its policy, coverage could not extend to the consequences of an accident which occurred January, 1976, or approximately eight months after the policy expired. Defendant, Shipley, on the other hand, contends that the policy is ambiguous and that the manufacture or sale of the products within the policy dates should be construed or held to be an accident for purposes of coverage, even though the actual accident and bodily injury did not occur until a later date subsequent to the expiration of the policy.

In National Aviation Underwrit. v. Idaho Aviation Ctr. (Idaho 1970), 471 P.2d 55, 57 it is said:

"***The problem of interpretation of the word 'accident' with respect to liability insurance policy period limitation clauses, although before this Court for the first time, has been considered by other courts in numerous cases. It is well settled that the time of the occurrence of an 'accident', within the meaning of a liability indemnity policy, is not the time the wrongful act was committed but the time the complaining party was actually damaged. ***."

See additionally footnote 2 containing cases in accord in said opinion.

In Scott v. Keever (Kan. 1973) 512 P.2d 346, 351 it is stated:

"As noted heretofore, the precise question appears before this court for the first time; however, questions concerning an injury arising outside the policy period with respect to products liability coverage such as that before us here are not strangers to the law of other jurisdictions. In some cases the coverage which defendants-appellees seek to impose is afforded by the terms of the policy and endorsements in question or implied from construction in the case of ambiguity, but in policies identical or similar to that at bar the settled rule is that the time when damage is suffered controls not when the wrongful act, which in the case of warranty claims is when the product wqs sold, occurs. In this connection the author of an annotation entitled 'Liability Insurance--Time of Incident' appearing in

57 A.L.R.2d §4(b), p. 1385, makes this statement:

"'It appears to be well settled that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrontful act was committed but the time when the complaining party was actually damaged. .....' (p. 1389)"

In Samuelson v. Chutich (Col.1974), 529 P.2d 631, 634 it was said:

"As to the question of when the 'accident' occurred, we agree with the Court of Appeals that it did not occur during the policy period. We quote with approval from the Court of Appeals opinion:

"'The insurance policy in question is not ambiguous; it covers only those injuries which are the result of accidents occurring during the period the policy was in force. The 'accident' causing injury in this case occurred at the time of the explosion, not when the allegedly wrongful act was committed. Home Mutual Fire Insurance Co. v. Hosfelt, 233 F.Supp. 368 (D.C. Conn.).... As the Court ststed in Hostfelt, supra:

"'To stretch the scope of 'accident backward in time to reach the date of the earliest beginning of any prior event which might be regarded as having a causal relation to the unlooked-for mishap would introduce ambiguity where none exists.'

"In Century Mutual Insurance Co. v. Southern Arizona Aviation, Inc., 8 Ariz.App. 384, 446 P.2d 490 (1968), it was stated that the word 'accident'

"'clearly implies a misfortune with concomitant damage to a victim, and not the negligence which eventually results in that misfortune.'"

The Court has read the case relied on by the defendant, Shipley, i.e. Sylla v. U.S. Fidelity and Guaranty Company, 54 Cal.App.34d 895, 127 Cal.Rep. 38, and finds that it is against the substantial weight of authority. Accordingly, as a matter of law, the Court finds that the provisions of the insurance policy hereinabove quoted are not ambiguous and as a matter of law the plaintiff's insurance contract does not extend to and cover the consequences of the accident and injuries thereby inflicted upon Kay Shipley on January 8, 1976, inasmuch as plaintiff's insurance policy with Defendant, Ruff N'Ready, had expired on May 14, 1975. The Court finds that no accident or bodily injury had occurred during the time of said policy's effective term.

Turning to the question of estoppel raised by the defendant, Shipley, in his Motion for Summary Judgment (the file revealing that the defendant, Shipley, has not filed an answer in this litigation), the Court notes the following language appearing in Wright and Miller, Federal Practice, Volume 10, §2735:

> "The question of when defendant may raise certain defenses by summary judgment has caused some confusion. It is fairly well settled that an affirmative defense may be asserted by a motion under Rule 56 made prior to the answer even though the facts supporting the defense do not appear on the face of the complaint. However, there is authority suggesting that if defendant files an answer in which he fails to plead an affirmative defense that is available to him, as required by Rule 8(c), that defense has been waived and will not be considered if there is an attempt to raise it by a subsequent motion for summary judgment. This seems to be an unnecessarily technical construction of the rules. The better view is that the court may grant defendant permission to raise an affirmative defense by summary judgment motion, perhaps following an amendment of his answer, at any time in the proceedings even though the defense was not pleaded in the original answer. *** If the court believes that the late assertion of a defense by summary judgment is unfair, it can try to ameliorate the effect by imposing terms and conditions or, if the prejudice cannot be obviated, by denying the motion."

The Court, therefore, finds that the defense of estoppel has been properly raised for consideration in the Motion for Summary Judgment filed by the defendant, Shipley.

In his Motion for Summary Judgment, the defendant, Shipley, states:

> ""Suit has been filed and pending in the State Court, which has previously been pointed out in this Motion. The Complainant, HARTFORD ACCIDENT AND INDEMNITY COMPANY has been defending this suit since its inception and has elected by its actions and representations to provide a defense in that action and should be estopped from withdrawing or denying this election."

In connection with this defense of estoppel, the Court has carefully read the deposition of Carol Bradin Schofield, filed May 30, 1978, and the Answers to Interrogatories filed by Hartford in response to interrogatories propounded by Shipley.

The pertinent questions and answers to Interrogatories submitted by Shipley and answered by Hartford are as follows:

> INTERROGATORY NO. 5: Did Hartford Accident and Indemnity Company retain Dan Rogers of the law firm Rogers, Rogers and Jones to represent Ruff N'Ready Underwear Company in the State Court action?
>
> ANSWER: Yes, but conditionally under reservation of

rights.

(a) When was Dan Rogers or the firm of Rogers, Rogers and Jones retained?

ANSWER: Approximately November 12, 1976.

(b) Does the firm, Rogers, Rogers and Jones represent Ruff N'Ready at present?

ANSWER: Yes, under reservation of rights and pending resolution of questions being litigated in this action.

(c) ***.

INTERROGATORY NO. 9: Did the Hartford Accident and Indemnity Company begin preparation of the defense of the State Court action, C 76-317 on behalf of the Defendant, Ruff N'Ready Underwear Company?

ANSWER: Yes, preliminary preparations under reservation of rights and to prevent said accident being in default.

(a) State when.

ANSWER: Approximately November 12, 1976.

INTERROGATORY NO. 10: Did the Hartford Accident and Indemnity Company or their Attorneys notify Ruff N'Ready Underwear Company or their Attorneys that the Hartford Accident and Indemnity Company was proceeding with the defense of this suit, but under a reservation of rights?

If so,

(a) When and to whom was the communication made?

ANSWER: From the first receipt of information concerning the litigation, there was oral notification to the agency, Allen, Russell and Allen, that coverage likely did not exist under the policy. This was confirmed to said agency by letter dated November 18, 1976.

(b) ***

INTERROGATORY NO. 12: Has the Hartford Accident and Indemnity Company or their Attorneys represented to anyone that they were defending Ruff N'Ready Underwear Company because they had entered into a contract of insurance with Ruff N'Ready Underwear Company?

ANSWER: No. All indications made, if any, would have been to the effect that a defense was being provided to Ruff N'Ready under reservation of rights and until questions of coverage could be determined.

The deposition of Carol Baradin Schofield reflects at page 41:

Q. Let me rephrase the question. Do you recall any communication from Mr. Rogers to the effect that he would be defending the interest of Ruff N'Ready Corporation on a reservation of rights basis until the legal question of coverage had been determined?

A. After July of '77, I think he may have indicated that to me.

Q. Okay.

A. Up until that point I felt quite confident and he had led me to believe that he was representing Ruff N'Ready Underwear Company, Inc., and told me that I had nothing to fear and didn't need, you know, to hire other counsel.

Q. Do you recall in April of 1977 Mr. Rogers informing you that his defense in this action, the state action, all right?---ought not be interpreted as a waiver of any rights which Hartford A & I had to deny coverage?

A. I don't recall it and I wouldn't be qualified to make those precise---

Q. All I am asking is whether you recall him informing you in April of 1977 of that particular fact.

A. No, I don't recall that; might have slipped by. I am not qualified. Actually, Mr. Baradin was the business aspect of Ruff N'Ready Underwear Company.

Q. In April of 1977 do you recall where you were residing?

A. April of '77?

Q. Right.

A. Yes, I was residing in Old Saybrook, Connecticut.

Q. Did you have a post office box of 239 at that time?

A. Yes, I did. Do you have a letter?

Q. Do you recall whether or not Mr. Rogers informed you that you may have been insured by Commercial Union Insurance Company?

A. I remember the name and I remember being confused by the reference to it and may have made some inquiries which I never completely satisfied in my own mind.

Q. Did you attempt to contact that insurance company?

A. I may have by phone.

Q. Did you attempt to contact Firemen's Fund?

A. Certainly not.

Q. Why do you say 'Certainly not'?

A. Mr. Rogers was representing me and I felt secure in his representation. I think the Firemen's Fund represents another aspect of this case.

Q. They don't represent Ruff N'Ready as far as you know?

A. Firemen's Fund? I think that they may have cooperated with Mr. Rogers initially but I think a man by the name of Mr. Bailey and I could be wrong in that name, was working closely with Mr. Rogers. I was---and I've indicated in some of these exhibits somewhat confused by that relationship.

Q. Prior to the time of July, 1977, when you claim th you received this information concerning the proble

with coverage, prior to that time do you recall any conversations dealing with that subject?

A. I think if I got that name and this is just, you know, from my own recollections, it may have come from Hartford rather than Mr. Rogers; may have come from my verbal inquiries to the office of Allan, Russell and Allan.

Q. What might have come from that?

A. My recollection of the name of the insurance company, the Commercial Union, Union Commercial? Norwich group is it?

Q. I don't know.

A. Something of that sort, I mean.

Q. Do you recall any conversations prior to July of '77 with anyone concerning the subject?

A. Somewhere along the line the name rights a bell. I can't place it in time.

Q. Do you recall discussing it with Mr. Rogers?

A. No, I don't but it's possible that I may have asked him who they were.

Q. Is it also possible that he may have discussed with you the problems with insurance coverage?

A. Actually he led me to believe---

Q. No; if you would answer my question.

A. No problems.

Q. Is it possible that you may have discussed that with him prior to July of '77?

A. I think I just answered that question, did I not?

Q. How did you answer it?

A. Could you [Addressed to the court reporter.] read back how I answered that?

Q. I don't believe you did answer. I'll ask it again. We'll see, okay?

A. Okay.

Q. Prior to July of 1977, do you recall discussing with Mr. Rogers the possibility of problems with insurance coverage?

A. No, I do not recall any possible problems of insurance coverage discussions with Mr. Rogers prior to July of--- and maybe it was August of '77.

Q. Well, isn't it true that---could I see the exhibits, please?

A. I got them all.

Q. Isn't the letter of July 12, 1977, addressed to you

in fact dealing with the subject of insurance coverage?

A. Let me see. However, that letter is in response to my inquiry of July 5th asking who represents whom.

Q. Okay. But in any case, it was not in Augudt; it was in July.

A. This letter is in July. I may have, you know, had a response from him in August, the mails being what they are today.

The Court, therefore, finds that there is a question of fact raised by the defense of estoppel as to when and how notice was given to the defendant, Ruf N' Ready of defense under a reservation of rights.

In 43 Am.Jur. 2d, Insurance, §146, it is stated:

"In the absence of special circumstances, including statutory or contractual provisions, an agent of the insurer who solicits or effects insurance clearly is not the agent of the insured."

Further in 44 Am.Jur.2d, Insurance, §1581, it is stated:

"There is a conflict of authority as to whether the fact that the liability or indemnity insurer defends the insured in an action not within the coverage of the policy constitutes an estoppel, a waiver, or an admission or assumption of liability as to the injured person so that the insurer thereby becomes bound to pay the injured person the amount of the judgment recovered against the insured, up to the limit of liability under the policy, without regard to whether such conduct would give the insured a right of action against the insurer in case the latter did not pay the judgment or reimburse the insured if he paid the judgment. According to the generally prevailing view, the insurer by such conduct renders itself liable to the injured person if it has not seasonably preserved its rights under a notice or agreement. Where, however, the insurer gives a seasonable notice to the injured person that it contends that the claim for injuries does not come within the coverage of the policy, and that it undertakes to defend the insured against such claim without thereby relinquishing its objection on the ground of noncoverage, the insurer does not become estopped, as to the injured person, to deny that the injury is covered by the policy by thereafter defending the insured. It has also been held that the insurer, having defended an action against the insured, was not estopped from subsequently setting up the defense of noncoverage against the injured person even where the latter had not been notified, usually on the theories that the injured person had surrendered no rights or had not been misled as a result of the defense by the insurer, or that, the injured person being a stranger to the agreement, no estoppel could operate in his favor."

In Day v. Hartford Accident & Indemnity Company (USDC ND Okl. 1963) 223 F.Supp. 953, 957 it was held:

> "The next contention is made by the plaintiff in this case to the effect that the defendant waived all policy defenses, and is estopped to deny coverage for the accident of August 30, 1959. Plainiff in this case is in no position to make such assertions. The policy was a contract between C. E. Winninger and Hartford, and the plaintiff had no interest therein. Hartford agreed to investigate and defend the case under a reservation of rights and it is between Hartford and the insured only whether Hartford waived any of its defenses. Neither C. Winninger or his son, Jack, have ever claimed or contended, so far as this record shows, that the reservationof rights letter referred to herein was not sufficient and effective. ***."

This Court is in agreement with the above holding, that the policy here involved is a contract between plaintiff and Ruff N'Ready, and that defendant, Shipley, is not the proper party to make the estoppel assertion.

Additionally, this Court finds, based on the pleadings, that defendant, Shipley, has not shown any reliance to the detriment of his position by the lack of insurance coverage by the plaintiff.

IT, IS, THEREFORE, ORDERED that the objections to the Findings and Recommendations of the Magistrate be and the same are hereby overruled.

IT IS FURTHER ORDERED that Summary Judgment be entered on this question in favor of the plaintiff and against the defendant, Shipley and that the plaintiff's Motion for Summary Judgment be sustained and the defendant, Shipley's Motion for Summary Judgment be overruled.

The Court will next consider the objection of the defendant, Shipley, to the Magistrate's Recommendation as to the entry of default judgment against the defendant, Ruff N'Ready in favor of the plaintiff. Defendant, Shipley, contends that valid service in the instant litigation was never had on the defendant, Ruff N'Ready.

The Court finds that valid service was in fact made on Ruff N'Ready as follows:

> 1. First, the service was obtained on the last registered service agent for Ruff'N Ready by serving Raymond Perra, Service Agent, 139 Main Street, Battleboro, Vermont, 05301 on May 27, 1977;
>
> 2. Second, Service was made on the Vermont Secretary of State, State House, Montpelier, Vermont, on August 19, 1977.

The Court, therefore, finds that the defendant, Ruff N'Ready is in default; that default judgment should be entered in favor of the plaintiff and against the defendant, Ruff N'Ready, and that the plaintiff's Motion for Default Judgment as to the defendant, Ruff N'Ready Underwear Co., Inc. should be and is hereby sustained; that the objections of the defendant, Shipley, to entry of default judgment should be and are hereby overruled.

IT IS SO ORDERED.

The remaining Findings and Recommendations of the Magistrate and the objections thereto by the defendant, Shipley, go to a stay of judgment and extension of time to take a deposition and for oral argument.

The Court finds that the deposition in question was taken by the parties pending the review of this Court of objections and Findings and Recommendation of the Magistrate and such objection is now moot and should be overruled as being moot. The Court further finds that the defendant, Shipley, is not entitled to a stay pending judgment and the request for oral argument should be overruled, the Court being of the opinion that no further argument is necessary for a proper determination of all the issues presently before the Court for determination.

IT IS SO ORDERED.

ENTERED this 30th day of June, 1978.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RAYMOND JOVER HALL, Petitioner,	)	
v.	)	No. 78-C-16
RICHARD A. CRISP, ET AL., Respondents.	)	

FILED
JUN 30 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

This is a proceeding brought pursuant to the provisions of Title 28 U.S.C. § 2254, by a state prisoner confined at the Oklahoma State Penitentiary, McAlester, Oklahoma. Petitioner attacks the validity of the judgment and sentence rendered and imposed by the District Court of Tulsa County, Oklahoma in Case No. CRF-76-124. Respondents filed their response herein pursuant to the Order of the Court to show cause. Petitioner thereafter filed a "Traverse to Response".

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights under the Constitution of the United States of America. In particular, petitioner claims:

> "That the trial court denial of petitioner motion to supress (sic) was reversible error because of an unconstitutional line-up and photo spread identification", in that "the pre-trial police practices made the confrontation conduced in the case unnecessarily suggestive and resulted in an irreparable mistaken identification."

Petitioner was convicted of robbery with firearms in the Tulsa County District Court and was sentenced on June 1, 1976 to a term of 50 years imprisonment. The conviction was affirmed by the Oklahoma Court of Criminal Appeals on May 27, 1977. Hall v. State, 565 P.2d 57 (1977). An application for post-conviction relief was filed by the Petitioner in the Tulsa County District Court which was denied November 14, 1977. Appeal was then taken to the Oklahoma Court of

Criminal Appeals which court affirmed the District Court's Order on December 16, 1977. Petitioner has exhausted available remedies in the courts of the State of Oklahoma with respect to the claim asserted herein.

In support of his claim for relief the Petitioner argues that the pretrial photograph display and lineup were improperly conducted and therefore impermissibly suggestive which resulted in the in-court identification being tainted.

The transcript of the record in this case reflects that Detective Kenneth Brown of the Tulsa Police Department interviewed Gale Wood, one of the eye witnesses to the robbery; that he displayed to her approximately 75 to 80 photographs; that she looked at the photographs from between 15 minutes to 30 minutes; that before viewing the photographs Mrs. Wood described the person who committed the robbery as "tall, about six-foot-five;" that in going through the photographs which he displayed, "when she came to the photograph of Raymond Hall she pulled it out and said this was him;" that she looked at the photograph of the suspect after picking it out of the group and said "this is the guy"; that when asked if she were positive she said "yeah". Tr. 20, 29, 30).

Officer Brown also testified that he asked Gale Wood if she noticed anything unusual about the man who came in and robbed her to which she replied "No". He then asked her if she notice anything unusual about the photograph to which she replied "No". He next asked her if she noticed anything unsual about the "man in the photographs eyes" and after looking at the photograph she said "Well, he's got one eye that droops". (Tr. 31).

Detective Brown further testified that the other witness, Sally Stewart, was unable to make a positive identification

from the photographs. Detective Brown testified that the eye witness Gail Wood identified Raymond Hall in the lineup as the person who robbed her. (Tr. 41) Gail Wood's testimony reflects that she made positive identification of Raymond Hall in the lineup. (Tr. 75-77). Detective Bill McCracken of the Tulsa Police Department testified that the eye witness Sally Stewart identified Raymond Hall in the pretrial lineup as the man who robbed her. (Tr. 53).

The petitioner argues that because of the photospread, where the eye defect was pointed out to the eye witness and the lineup where petitioner was the only one dressed in studded pants, as the robber had been dressed, that the in-court identification was tainted and should not have been admitted. In the opinion of the Oklahoma Court of Criminal Appeals, the Court stated:

> "Certainly the conduct of the Tulsa police in this case is not to be condoned. The in person line-up should have been conducted with all the line-up participants clothed in studded pants, or none of them. However, we are impressed with the fact that the first identification was made by the women from fifty photographs which they viewed while separated and from which they independently identified the defendant. Furthermore, as discussed below, the wintesses (sic) in this case were positive in their identification from the very beginning. And after a review of the record and of the photographs of the line-up introduced into evidence, we do not find that the trial court was in error in allowing the in-court identification of the defendant." Hall v. State, Supra.

The Court further stated:

> "In the instant case the opportunity to make an identification was excellent. The victims and the robbers were in close quarters in good light for an extended period of time. Ms. Wood's identification of the defendant was firm and positive from the very beginning. She testified that she made a point of studying the men's faces so that she would be able to recognize them later. At no time was she hesitant or doubtful. And although at the photospread Ms. Stewart said only 'this looks like the man,' she was nevertheless able to pick out two pictures of the defendant taken at difference times. Also, after an opportunity to view the man in the photograph in person at

the police lineup, her identification, too, remained firm and positive." Hall v. State, Supra.

In reviewing the complete trial transcript with respect to the pretrial identification procedures it does not appear that such procedures were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification". Simmons v. United States, 390 U.S. 377, 384; See also Stovall v. Denno, 388 U.S. 293; Neil v. Biggers, 409 U.S. 188; United States v. Wade, 388 U.S. 218.

For the reasons stated herein, the Petition for Writ of Habeas Corpus should be and is hereby denied.

IT IS SO ORDERED this 30th day of June, 1978.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBIE CLAUD RUTLEDGE,

Plaintiff,

vs.

ROADWAY EXPRESS, INC., a corporation, McDONNELL DOUGLAS CORPORATION, a corporation, and JOHN DOE EATON, an individual,

Defendants,

No. 78-C-236-B

NOTICE OF DISMISSAL

COMES now the plaintiff, BOBBIE CLAUD RUTHLEDGE, and pursuant to Rule 41 (a)(1)(i) of the Federal Rules of Civil Procedure hereby dismisses without prejudice the above styled action against all of the defendants therein.

Dated this 30th day of June, 1978.

FRAZIER, GRAHAM, SMITH & FARRIS
Attorneys for Plaintiff
1424 Terrace Drive
Tulsa, Oklahoma

By: _____
PHIL FRAZIER

CERTIFICATE OF MAILING

I, PHIL FRAZIER, do hereby certify that a true and correct copy of the above and foregoing instrument was mailed this 30th day of June, 1978 to DOW BONNELL, Attorney for Defendants, P.O. Box 1439, Tulsa, Oklahoma 74104.

_____
PHIL FRAZIER

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JIMMY WISE, a/k/a J.R. WISE, SUSIE J. WISE, OSCAR R. CUMMINS, NAOMI F. CUMMINS, LOIS LINDSEY, FARMERS NON STOCK COOPERATIVE GRAIN ASSOCIATION, WEST SIDE AUTO SERVICE, a Corporation, JAMES BRITT, ELLA L. HAYS, R.H. ARNOLD d/b/a ARNOLD'S USED CARS, STURDIVANT INSURANCE AGENCY, INC., and OKLAHOMA OSTEOPATHIC FOUNDERS ASSOCIATION, INC., a Corporation, d/b/a OKLAHOMA OSTEOPATHIC HOSPITAL, Defendants.	)	Civil Action No. 78-C-18-B

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 30th day of June, 1978, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendants, Jimmy Wise a/k/a J. R. Wise, Susie J. Wise, Oscar R. Cummins, Naomi F. Cummins, Lois Lindsey, Farmers Non Stock Cooperative Grain Association, West Side Auto Service, a Corporation, James Britt, Ella L. Hays, R. H. Arnold d/b/a Arnold's Used Cars, Sturdivant Insurance Agency, Inc., and Oklahoma Osteopathic Founders Association, Inc., a Corporation, d/b/a Oklahoma Osteopathic Hospital, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Jimmy Wise a/k/a J. R. Wise, Susie J. Wise, Oscar R. Cummins, Naomi F. Cummins, Lois Lindsey, Farmers Non Stock Cooperative Grain Association, West Side Auto Service, a Corporation, and R. H. Arnold d/b/a Arnold's Used cars, were served by publication as shown on the Proof of Publication filed herein; and, that Defendant, Sturdivant Insurance Agency, Inc., was served with Summons, Complaint, and Amendment

to Complaint on January 25, 1978, and February 15, 1978, respectively; that Defendant, James Britt, was served with Summons, Complaint, and Amendment to Complaint on January 30, 1978, and March 16, 1978, respectively; that Defendant, Ella L. Hays, was served with Summons, Complaint, and Amendment to Complaint on January 26, 1978, and March 23, 1978, respectively; that Defendant, Oklahoma Osteopathic Founders Association, Inc., a Corporation, d/b/a Oklahoma Osteopathic Hospital, was served with Summons, Complaint, and Amendment to Complaint on February 16, 1978; all as appears on the United States Marshal's Service herein.

It appearing that the Defendants, Jimmy Wise a/k/a J. R. Wise, Susie J. Wise, Oscar R. Cummins, Naomi F. Cummins, Lois Lindsey, Farmers Non Stock Cooperative Grain Association, West Side Auto Service, a Corporation, James Britt, Ella L. Hays, R. H. Arnold d/b/a Arnold's Used Cars, Sturdivant Insurance Agency, Inc., and Oklahoma Osteopathic Founders Association, Inc., a Corporation, d/b/a Oklahoma Osteopathic Hospital, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Thirty-Five (35), Block Five (5), LAKEVIEW HEIGHTS AMENDED ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Jimmy Wise and Susie J. Wise, did, on the 21st day of January, 1975, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $9,500.00 with 9 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Jimmy Wise and Susie J. Wise, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $9,428.56 as unpaid principal with interest thereon at the rate of 9 1/2 percent per annum from March 1, 1977, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Jimmy Wise and Susie J. Wise, in rem, for the sum of $9,428.56 with interest thereon at the rate of 9 1/2 percent per annum from March 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Susie J. Wise, Oscar R. Cummins, Naomi F. Cummins, Lois Lindsey, Farmers Non Stock Cooperative Grain Association, West Side Auto Service, a Corporation, James Britt, Ella L. Hays, R. H. Arnold d/b/a Arnold's Used Cars, Sturdivant Insurance Agency, Inc., and Oklahoma Osteopathic Founders Association, Inc., a Corporation, d/b/a Oklahoma Osteopathic Hospital.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED

ROBERT P. SANTEE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

GULF STATES MANUFACTURERS, INC. a corporation,	)	
Plaintiff,	)	
vs.	)	No. 78-C-180-B
FERRELL CONSTRUCTION COMPANY, INC. a corporation; NATIONAL HYDRO-HOIST COMPANY, a corporation; and AQUA DEVELOPMENT, INC., a corporation,	)	
Defendants.	)	

FILED

JUN 30 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION OF DISMISSAL

Comes now the Plaintiff, Gulf States Manufacturers, Inc., and the Defendants, Ferrell Construction Company, Inc., National Hydro-Hoist Company, and Aqua Development, Inc., and hereby stiuplate by and through their respective attorneys that all claims of the Plaintiff against the Defendants, and each of them, and the Counterclaim (denominated as Cross-Petition) of Defendant Ferrell Construction Company, Inc. against the Plaintiff, may be dismissed with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure.

So stipulated this 30th day of June, 1978.

BOESCHE, McDERMOTT & ESKRIDGE

By Donald R. Wetrich
320 South Boston - Suite 1300
Tulsa, Oklahoma 74103

ATTORNEY FOR PLAINTIFF
GULF STATES MANUFACTURERS, INC.

SMITH, BROWN, MARTIN, ADKISSON & BIRMINGHAM

By Jon A. Man
410 Beacon Building
Tulsa, Oklahoma 74103

ATTORNEY FOR DEFENDANT
FERRELL CONSTRUCTION COMPANY, INC.

KIGHT AND SIBLEY

By T. Wade Sibley
114 West Will Rogers
Claremore, Oklahoma 74017

ATTORNEY FOR DEFENDANTS
AQUA DEVELOPMENT, INC. and
NATIONAL HYDRO-HOIST COMPANY

CERTIFICATE OF SERVICE

I certify that I mailed a true and correct copy of the foregoing Stipulation of Dismissal to Smith, Brown, Martin, Adkisson & Birmingham, Attorneys for Defendant, Ferrell Construction Company, Inc., 410 Beacon Building, Tulsa, Oklahoma 74103, and to Kight and Sibley, 114 West Will Rogers, Claremore, Oklahoma 74017, in the United States mails in Tulsa Oklahoma, with first class postage thereon prepaid, this 30th day of June, 1978.

Donald Detrick

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHAD EDWARD CARR, a minor, by and through JERRY G. CARR, his father and next friend,

Plaintiff,

vs.

THE PRESLEY COMPANY, a corporation, and MONKEM COMPANY, INC., a corporation,

Defendants.

NO. 77 C 459 C

FILED

JUN 30 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

On June 19th, 1978, the above captioned case came on for trial. The plaintiffs appeared by their attorneys, Baker, Baker & Martin. The defendant The Presley Company appeared by its attorneys, Best, Sharp, Thomas & Glass. The defendant Monkem Company appeared by its attorneys Knight & Wagner. All parties announced ready for trial and agreed that a jury would be waived and the case tried to the Court. Thereafter testimony was presented and various stipulations entered into. After hearing all of the testimony and stipulations the Court finds that Chad Edward Carr, a minor, by and through Jerry G. Carr, his father and next friend, is entitled to judgment against the defendants in the amount of $100,000.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Chad Edward Carr, a minor, by and through Jerry G. Carr, his father and next friend, against the defendants The Presley Company, a corporation, and Monkem Company, Inc., a corporation, in the amount of $100,000 and for the costs of the action.

The Honorable Dale Cook
Judge of the District Court

APPROVED AS TO FORM:

Baker, Baker & Martin
1850 South Boulder
Tulsa, OK 74119

Best, Sharp, Thomas & Glass
300 Oil Capital Building
Tulsa, OK 74103

Knight & Wagner
310 Beacon Building
Tulsa, OK 74103

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NATHAN HALE NEIGHBORHOOD ASSOCIATION, INC., an Oklahoma Corporation,

Plaintiff,

vs.

RAY MARSHAL, SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

Defendant.

14th and Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 523-8165

and

RAYMOND E. YOUNG, DIRECTOR, JOB CORPS, UNITED STATES DEPARTMENT OF LABOR,

Defendant.

14th and Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 523-8165

CIVIL ACTION NO. 78-C-186-C

STIPULATION OF DISMISSAL

COME NOW the Defendants, Ray Marshal, Secretary, United States Department of Labor, and Raymond E. Young, Director, Job Corps, United States Department of Labor, by and through their attorney, Eleanor Darden Thompson, Assistant United States Attorney for the Northern District of Oklahoma; and Plaintiff, Nathan Hale Neighborhood Association, an Oklahoma Corporation, by and through their attorney, Marvin E. Spears, and together make the following stipulation in the above-entitled case:

I.

The United States is not presently establishing a Job Corps Training Center at the facilities known as The American Christian College, whether by purchase, lease or otherwise. Notice of such decision was given to the Trustees of said College by letter of May 25, 1978, from Raymond E. Young, Director, Job Corps, United States Department of Labor.

WHEREFORE, both Defendants and Plaintiff do aver that by virtue of the above-stated facts, the Complaint and Application for injunctive relief filed by Plaintiff in the above-entitled action are moot and therefore, this action is hereby dismissed without prejudice.

Respectfully submitted,

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ELEANOR DARDEN THOMPSON
Assistant United States Attorney
Attorneys for Defendants

Eleanor Darden Thompson

NATHAN HALE NEIGHBORHOOD ASSOCIATION, INC.

By: _____

MARVIN E. SPEARS
Attorney for Plaintiff
Suite 725, City Plaza-West
5310 East 31st Street
Tulsa, Oklahoma 74135
(918) 663-2500

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HARTFORD ACCIDENT & INDEMNITY COMPANY, Plaintiff, vs. RUFF N'READY UNDERWEAR CO., INC., a Vermont Corporation, and JACK SHIPLEY, individually and as Administrator of the Estate of KAY SHIPLEY, Deceased. Defendant.	)	77-C-201-B

JUDGMENT

Pursuant to the Order filed this date, IT IS ORDERED that Judgment be entered as follows:

1. That Judgment be entered in favor of the plaintiff, Hartford Accident & Indemnity Company and against the defendant, Jack Shipley, individually and as Administrator of the Estate of Kay Shipley, Deceased;

2. That Default Judgment be entered in favor of the plaintiff, Hartford Accident & Indemnity Company and against the defendant, Ruff N'Ready Underwear Co., Inc.

ENTERED this 30th day of June, 1978.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

LINDA HEIDLEBERG and GEROGE HEIDLEBERG,	)	FILED
Plaintiffs,	)	JUN 30 1978
-vs-	)	Jack C. Silver, Clerk
NATIONAL REFRIGERATED TRANSPORT, INC., a Louisiana Corporation, and RUSSELL ADAMSON, individually,	)	U. S. DISTRICT COURT
Defendants.	)	NO. 77-C-175-B

JOURNAL ENTRY OF JUDGMENT

Jury trial of the above entitled matter commenced on June 19, 1978, and on June 21, 1978, the jury returned a verdict in favor of the defendants. It is the findings of this Court that the jury verdict be accepted and filed of record and judgment entered accordingly in favor of the defendants, and the plaintiffs pay their own costs.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiffs recover nothing from the defendants and that the action be dismissed on the merits and that the defendants recover from the plaintiffs, their costs in this action.

Allen E. Barrow

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF MAILING

I, RAY H. WILBURN, do hereby certify that on the 22nd day of June, 1978, I mailed a true and correct copy of the above and foregoing Journal Entry of Judgment to Mr. Curtis L. Culver, 630 West 7th, Suite 402, Tulsa, Oklahoma 74127, with proper postage thereon fully prepaid.

RAY H. WILBURN

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 78-C-226-C
TROY W. PIERCE, BRENDA J. PIERCE, HOUSING AUTHORITY OF THE CITY OF TULSA, and F. W. WOOLWORTH, a corporation, d/b/a WOOLCO, Defendants.	)	

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 30th day of June, 1978, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendants, Troy W. Pierce, Brenda J. Pierce, Housing Authority of the City of Tulsa, and F. W. Woolworth, a corporation, d/b/a Woolco, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Troy W. Pierce, Brenda J. Pierce, and F. W. Woolworth, a corporation, d/b/a Woolco, were served with Complaint and Summons on May 25, 1978; that Housing Authority of the City of Tulsa was served with Complaint and Summons on May 24, 1978, all as appears from the United States Marshal's Service herein.

It appearing that the Defendants, Troy W. Pierce, Brenda J. Pierce, Housing Authority of the City of Tulsa, and F. W. Woolworth, a corporation, d/b/a Woolco, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Six (6), Block One (1), VALLEY VIEW ACRES ADDITION, to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

THAT the Defendants, Troy W. Pierce and Brenda J. Pierce, did, on the 28th day of February, 1976, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $9,500.00, with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Troy W. Pierce and Brenda J. Pierce, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $9,432.89, as unpaid principal with interest thereon at the rate of 9 percent per annum from December 1, 1977, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Troy W. Pierce and Brenda J. Pierce, in personam, for the sum of $9,432.89, with interest thereon at the rate of 9 percent per annum from December 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Housing Authority of the City of Tulsa and F. W. Woolworth, a corporation, d/b/a Woolco.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED

ROBERT P. SANTEE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BILLY GENE MARSHALL, # 87494, Petitioner,

v.

J. M. SUNDERLAND, Warden, et al., Respondents.

NO. 78-C-14-B

ORDER

This is a proceeding pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Petitioner, Billy Gene Marshall. Petitioner is a prisoner in the Oklahoma State Reformatory, Granite, Oklahoma. He was convicted by jury of the offense of robbery by fear, after former conviction of a felony, in the District Court of Osage County, State of Oklahoma, in Case No. CRF-73-394, and sentenced to a term of thirty years imprisonment. This conviction was on retrial, his first conviction reversed and remanded for a new trial for prosecutorial comment on Defendant's failure to testify. Marshall v. State, Okl. Cr., 527 P.2d 177 (1973).

Petitioner contends in his § 2254 petition that his rights guaranteed by the Constitution of the United States were violated in the State conviction and demands his release from custody asserting the following grounds:

1. His conviction was obtained in violation of his privilege against self-incimination in that his coerced confession was allowed into evidence as was opinion evidence of a cell mate.

2. The prosecutor was allowed to comment on Defendant's failure to testify at trial.

3. Excessive punishment was imposed in light of the evidence introduced and the invalidity of a former conviction which was obtained when Defendant was only 16 years of age and did not have counsel at a critical stage of the prior conviction in Sedgwick County, Kansas.

4. The Oklahoma recidivist statute is in violation of the constitutional guarantee against double jeopardy.

5. He was denied an adequate appeal in that he was refused his transcript to prepare a post-conviction proceeding, and the Court would not consider constitutional claims not raised on direct appeal.

Respondents assert that Petitioner's issues have not been properly presented to the State Courts of Oklahoma and that his § 2254 petition should be denied for failure to exhaust State remedies.

Petitioner filed a direct appeal, Case No. F-75-550, of his conviction and sentence challenged in his petition before this Court. His appellate brief and the opinion of the Oklahoma Court of Criminal Appeals

reported Marshall v. State, Okl. Cr., 561 P.2d 1370 (1977), show that issues one and two and part of the excessive punishment claim presented in the § 2254 petition to this Court have been considered and ruled upon by the Oklahoma Court of Criminal Appeals and are properly before this Court for consideration. Sandoval v. Rodriguez, 461 F.2d 1097 (10th Cir. 1972).

Further, in the District Court of Osage County, State of Oklahoma, subsequent to the direct appeal, Petitioner filed a motion for his trial transcript in Case No. CRF-75-73, which is not the case challenged before this Court, to use in preparing an application for post-conviction relief pursuant to 22 O.S.Supp. 1974 § 1080, et seq., to no avail. He, thereafter, filed a Petition for writ of habeas corpus, Case No. H-77-773, in the Oklahoma Court of Criminal Appeals asking that the Judgment and Sentence in Case No. CRF-75-73 be set aside on the ground that he had been denied his transcripts to perfect an appeal pursuant to the post-conviction procedure act, 22 O.S. § 1080, et seq. The Oklahoma Court of Criminal Appeals denied the Petition for Writ of Habeas Corpus by Order dated and filed November 7, 1977, and in the Order the Appellate Court directed Petitioner's attention to the procedures and statutes of the State of Oklahoma to be followed in a post-conviction proceeding. Petitioner chose not to follow the State procedures and by-passing them filed his present petition in this Court. His third, fourth, and fifth claims have not been presented to the State Courts of Oklahoma and therefor are premature in the Federal Court and will not be considered herein. There is no principle in the realm of Federal habeas corpus better settled than that adequate and available State remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U. S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U. S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969) reversed on other grounds, 401 U. S. 560 (1971); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971).

Being fully advised in the premises, having carefully reviewed the petition, response, "Traverse," State files and transcripts in CRF-73-394, the Court finds:

The first claim has been considered by the Oklahoma Court of Criminal Appeals and correctly decided against Petitioner. Petitioner's motion to suppress his statement was heard by the Trial Court in the absence of the jury according to the requirements of Jackson v. Denno, 378 U. S. 368 (1968). The evidence, as shown by the transcript, supports the Trial Court's ruling that the Petitioner was twice given his Miranda v. Arizona, 384 U. S. 436 (1966) warnings. He knowingly and intelligently waived his privilege against self-incrimination and made his uncoerced statement. The State met its heavy burden of proof and the evidence was properly admitted at trial.

The second issue that the prosecutor was allowed to comment on Petitioner's failure to testify at trial is also without merit. On redirect examination of a defense witness (Tr. p. 767) the following occurred:

Defense counsel: "You stated you based you (sic) opinion on the way he acted when you asked him what?"

Prosecutor: "I object, Your Honor, the defendant is available."

An immediate conference was held at the Bench, out of the hearing of the jury, in which the defense moved for mistrial on the ground that the State had eluded to defendant being available to testify, and that said statement was prejudicial and in violation of the defendant's right against self-incrimination. The Court offered to admonish the jury, however, defense counsel did not wish an admonishment as he believed it would call the jury's attention to the statement and further prejudice the defendant on his right to remain silent.

Unquestionably, the prosecution statement was improper. However, the test is whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. Knowles v. United States, 224 F.2d 168 (10th Cir. 1955); Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976) cert. denied 429 U. S. 849 (1976); United States v. Bennett, 542 F.2d 63 (10th Cir. 1976) cert. denied 429 U. S. 1048 (1977). In considering this contention, the Oklahoma Court of Criminal Appeals found that the prosecutor was merely commenting on the evidence which defense counsel was attempting to elicit from the witness and that he was not commenting on the defendant's failure to testify. This Court agrees

with the State Appellate Court as to the intent of the objection. Further, this Court finds that the objection was not of such a character that the jury would naturally and certainly not necessarily take it to be a comment on the failure of the accused to testify.

Petitioner's reference to the admission of a cellmate's opinion evidence is without merit. This witness was called by the defense and Petitioner should not be heard to complain. The Trial Court correctly ruled that the testimony was that of a lay person rather than an expert.

The jury assessed the punishment in the second stage of the trial after guilt had been established. The sentence is within the statutory limits provided by the Statute violated. Under these circumstances, the assertion that the heavier sentence on the second trial is to discourage appeals is without merit and the sentence within the statutory limits is not excessive punishment. See, Sinclair v. Turner, 447 F.2d 1158 (10th Cir. 1971) cert. denied 405 U. S. 1048 (1972); Cooper v. United States, 403 F.2d 71 (10th Cir. 1968).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Billy Eugene Marshall be and it is hereby denied and the case is dismissed, without prejudice, as to the issues on which State remedies have not been exhausted.

Dated this 28th day of June, 1978, at Tulsa, Oklahoma.

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

IN THE MATTER OF THE TAX)
INDEBTEDNESS OF CHARLES R. GAITHER,) Docket No. 78-C-174-B

NOTICE OF DISMISSAL

COMES NOW the petitioner, United States of America, and pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, dismisses this action.

As indicated on the back of the attached original Order For Entry on Premises to Effect Levy, issued April 24, 1978, said Order was executed on April 27, 1978, and is herewith returned.

Respectfully submitted,

HUBERT H. BRYANT
United States Attorney

Kenneth P. Snoke

KENNETH P. SNOKE
Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAILING

I hereby certify that a true and correct copy of the above and foregoing Notice of Dismissal was mailed to Charles R. Gaither, 15115 South 76th East Avenue, Bixby, Oklahoma, by placing a copy thereof in the United States Mails at Tulsa, Oklahoma, this 28th day of June, 1978.

Kenneth P. Snoke

KENNETH P. SNOKE

FILED

APR 24 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

IN THE MATTER OF THE TAX)
INDEBTEDNESS OF CHARLES R. GAITHER,)

Docket No. 78-C-174-B

RECEIVED
JUN 27 1978
U. S. ATTORNEY

ORDER FOR ENTRY ON PREMISES
TO EFFECT LEVY

The United States, having filed an application requesting authorization for B. Wayne Ockerman, a revenue officer of the Internal Revenue Service, to enter the premises located at 15115 South 76th East Avenue, Bixby, Oklahoma, in order to seize property in satisfaction of unpaid federal taxes, together with his affidavit in support of that application and the Court finding, on the basis of the affidavit, that there is probable cause to believe that property or rights to property which is subject to levy by the United States pursuant to Section 6331 of the Internal Revenue Code is located on or within the premises described, it is

ORDERED that the revenue officer is authorized to enter the premises described and to make such search as is necessary in order to levy and seize, pursuant to Section 6331 of the Internal Revenue Code of 1954. In making this search and seizure, however, the revenue officer is directed to enter the premises during business hours or the day time and within 10 days of this order.

Dated: April 24, 1978

Allen E. Barrow
UNITED STATES DISTRICT JUDGE

United States District Court)
Northern District of Oklahoma) ss

I hereby certify that the foregoing is a true copy of the original on file in this Court.

Jack C. Silver, Clerk
By H. Quarles
Deputy

AFFIDAVIT OF SERVICE:

On April 27, 1978 this Order of Entry was served on Charles R. Gaither at 15115 S. 76th East Avenue, Bixby, Oklahoma 74008. The building at this address was entered by myself and John Preston, Revenue Officer, in the presence of Charles R. Gaither. No assets were found or seized.

B. Wayne Ockerman
Revenue Officer

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ANNA W. JOHNSON,

Plaintiff

vs.

SAFEWAY STORES, INC.,
a foreign corporation,

Defendant

No. 77 C 65 B

STIPULATION FOR DISMISSAL WITH PREJUDICE

COMES now, ANNA W. JOHNSON, plaintiff, and SAFEWAY STORES, INC., defendant, by and through their respective attorneys of record, and stipulate that the above styled and numbered cause of action should be dismissed with prejudice, inasmuch as all matters in controversy have been fully compromised and settled between the party litigants herein.

Lloyd C. Larkin
Attorney for Plaintiff

Michael P. Atkinson
Attorney for Defendant

ORDER

NOW on this 26th day of June, 1978, this matter comes on for hearing pursuant to the Stipulation For Dismissal With Prejudice filed herein. Being advised that all claims and controversies existing between the parties have been fully compromised and settled, the Court finds that the plaintiff's action should be dismissed with prejudice.

IT IS THEREFORE ORDERED, adjudged and decreed that the above styled and numbered cause of action is hereby dismissed with prejudice.

Allen E. Barrow
United States District Judge

dkg

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BILLIE JAY KILLION and DELMAR EUGENE HANLEY, Petitioners,	)	
v.	)	NO. 75-C-220-B
DAVE FAULKNER, Sheriff, Respondent.	)	
DEREK LEE WILSON, Petitioner,	)	
v.	)	NO. 75-C-227-B
DAVE FAULKNER, Sheriff, Respondent.	)	

O R D E R

The Court has for consideration the Motion of Respondent to dismiss due to mootness the above styled causes. The mootness upon which the Respondent's motion is predicated derives from the fact that pursuant to the appellate mandates herein, reported sub nom. Bromley v. Crisp, 561 F.2d 1351, 1361-1363 (10th Cir. 1977), the Oklahoma State Courts have already vacated the convictions challenged herein. The Petitioner's acknowledge that their convictions have been vacated pursuant to Order(s) granting post-conviction relief, in Billie Jay Killion v. State, Tulsa Co., No. 17919, February 1, 1978 (per the Hon Raymond W. Graham, District Judge), Derek Lee Wilson v. State, Tulsa Co., Nos. CRF-70-1327, CRF-70-1560, CRF-70-1910, CRF-70-1915 and CRF-70-2012, February 7, 1978 (per the Hon. Margaret Lamm, District Judge), and Delmar Eugene Hanley v. State, Tulsa Co., Nos. 23361, 23362 and 23363, February 13, 1978 (per the Hon. Raymond W. Graham, District Judge). The motion to dismiss the petitions for writ of habeas corpus as moot, the relief sought having been granted, should be sustained.

The Tenth Circuit Court of Appeals, by supplemental mandate received and filed June 1, 1978, modified the prior mandate to allow appellate costs as applied for to Billy Jay Killion, Delmar Eugene Hanley and Derek Lee Wilson, in the sum of $386.00. Petitioners in their response to the motion to dismiss for mootness assert that said sum has not been paid and that there are still some costs at the District Court level herein which have not been taxed. Further, Petitioners contend that there is a question of expungement of records upon which State remedies have not been

exhausted. The Court finds that as to these latter issues the dismissals should be without prejudice.

IT IS, THEREFORE, ORDERED that the petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Billie Jay Killion and Delmar Eugene Hanley, Case No. 75-C-220, and of Derek Lee Wilson, Case No. 75-C-227, be and they are hereby dismissed as moot, said relief having been granted by the State Courts of Oklahoma, with appellate costs in the sum of $386.00 as mandated by the Tenth Circuit Court of Appeals.

IT IS FURTHER ORDERED that the dismissals herein are without prejudice to the filing of later petitions regarding expungement of records as to the State convictions, if necessary, after State remedies have been exhausted.

Dated this 26th day of June, 1978, at Tulsa, Oklahoma.

Allen E. Barrow

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BILLIE JAY KILLION and DELMAR EUGENE HANLEY, Petitioners,	)	
v.	)	NO. 75-C-220-B
DAVE FAULKNER, Sheriff, Respondent.	)	
DEREK LEE WILSON, Petitioner,	)	
v.	)	NO. 75-C-227-B
DAVE FAULKNER, Sheriff, Respondent.	)	

O R D E R

The Court has for consideration the Motion of Respondent to dismiss due to mootness the above styled causes. The mootness upon which the Respondent's motion is predicated derives from the fact that pursuant to the appellate mandates herein, reported sub nom. Bromley v. Crisp, 561 F.2d 1351, 1361-1363 (10th Cir. 1977), the Oklahoma State Courts have already vacated the convictions challenged herein. The Petitioner's acknowledge that their convictions have been vacated pursuant to Order(s) granting post-conviction relief, in Billie Jay Killion v. State, Tulsa Co., No. 17919, February 1, 1978 (per the Hon Raymond W. Graham, District Judge), Derek Lee Wilson v. State, Tulsa Co., Nos. CRF-70-1327, CRF-70-1560, CRF-70-1910, CRF-70-1915 and CRF-70-2012, February 7, 1978 (per the Hon. Margaret Lamm, District Judge), and Delmar Eugene Hanley v. State, Tulsa Co., Nos. 23361, 23362 and 23363, February 13, 1978 (per the Hon. Raymond W. Graham, District Judge). The motion to dismiss the petitions for writ of habeas corpus as moot, the relief sought having been granted, should be sustained.

The Tenth Circuit Court of Appeals, by supplemental mandate received and filed June 1, 1978, modified the prior mandate to allow appellate costs as applied for to Billy Jay Killion, Delmar Eugene Hanley and Derek Lee Wilson, in the sum of $386.00. Petitioners in their response to the motion to dismiss for mootness assert that said sum has not been paid and that there are still some costs at the District Court level herein which have not been taxed. Further, Petitioners contend that there is a question of expungement of records upon which State remedies have not been

exhausted. The Court finds that as to these latter issues the dismissals should be without prejudice.

IT IS, THEREFORE, ORDERED that the petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Billie Jay Killion and Delmar Eugene Hanley, Case No. 75-C-220, and of Derek Lee Wilson, Case No. 75-C-227, be and they are hereby dismissed as moot, said relief having been granted by the State Courts of Oklahoma, with appellate costs in the sum of $386.00 as mandated by the Tenth Circuit Court of Appeals.

IT IS FURTHER ORDERED that the dismissals herein are without prejudice to the filing of later petitions regarding expungement of records as to the State convictions, if necessary, after State remedies have been exhausted.

Dated this 26th day of June, 1978, at Tulsa, Oklahoma.

Allen E. Barrow

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BILLY GENE MARSHALL, # 87494, Petitioner,

v.

J. M. SUNDERLAND, Warden, et al., Respondents.

NO. 77-C-535-B

O R D E R

This is a proceeding pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Petitioner, Billy Gene Marshall. Petitioner is a prisoner in the Oklahoma State Reformatory, Granite, Oklahoma, pursuant to Judgment and Sentence in the District Court of Osage County, State of Oklahoma, in Case No. CRF-74-728. Therein, he was convicted of perjury after former conviction of a felony.

Petitioner contends that his rights guaranteed by the Constitution of the United States were violated in the State conviction and demands his release from custody asserting the following grounds:

1. He was denied a speedy trial in that the alleged perjury took place on October 24, 1973, in a hearing on a suppress motion in Case No. CRF-73-394 and the information charging the perjury was not filed until October, 1974.

2. There was insufficient evidence at trial to prove the essential elements of the charge under 21 O.S.A. § 491.

3. The Trial Court submitted an improper and prejudicial instruction to the jury shifting the burden of proof from the prosecution to the defense.

4. The jury was allowed to consider an invalid former conviction in determining the sentence to be imposed in that Petitioner was only 16 years of age and did not have counsel at a critical stage of the former conviction in Sedgwick County, Kansas.

5. The Oklahoma recidivist statute is in violation of the constitutional guarantee against double jeopardy.

Petitioner filed a direct appeal, Case No. F-76-28, and the State appellate Court affirmed the Judgment and Sentence on June 17, 1976, reported Marshall v. State, Okl. Cr., 551 P.2d 291 (1976).

Being fully advised in the premises, having carefully reviewed the petition, response, State files and transcripts in Case No. CRF-74-728, the Court finds that State remedies have been exhausted as to the first three grounds presented to this Court. The Fourth and Fifth issues have not been presented to the State Courts of Oklahoma and therefor are premature in the Federal Court and will not be considered herein.

The State of Oklahoma provides remedies by post-conviction procedure pursuant to 22 O.S.A. § 1080, et seq., and habeas corpus pursuant to 12 O.S.A. § 1331, et seq. There is no principle in the realm of Federal habeas corpus better settled than that adequate and available State remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U. S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U. S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969) reversed on other grounds, 401 U. S. 560 (1971); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971).

The first claim that Petitioner was denied a speedy trial in that the crime took place on October 24, 1973, and the information was not filed until October 28, 1974, is without merit. This issue was presented to the Oklahoma Court of Criminal Appeals and was fully and accurately dealt with by that Court. This Court agrees with their ruling. Further, the charge was filed well within the three year statute of limitations, no oppressive delay or actual prejudice raising a due process issue is found. Prosecutorial delay to gain a tactical advantage is not proved, and Petitioner's general assertion of prejudice is refuted by the record of the proceedings. United States v. Marion, 404 U. S. 307 (1971); United States v. Lovasco, 431 U. S. 783 (1977); United States v. Villano, 529 F.2d 1046, 1060 (10th Cir. 1976) cert. denied 426 U. S. 953 (1976); United States v. Irvin, Unpublished No. 75-1945 (10th Cir. filed June 24, 1977).

Petitioner's second contention that there was insufficient evidence to convict was found to be without merit by the Oklahoma Court of Criminal Appeals. This Court concurs. There was ample evidence to support the conviction. The issue raises no constitutional question cognizable in this habeas corpus proceeding as the conviction was not so devoid of evidentiary support as to raise a due process issue. Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970); Mathis v. People of the State of Colorado, 425 F.2d 1165 (10th Cir. 1970).

Petitioner's third allegation that the Trial Court gave improper and prejudicial instructions to the jury shifting the burden of proof from

the prosecution to the defense is not supported by the record. Thus, the attack on the instructions herein raises no Federal constitutional question. Ortiz v. Baker, 411 F.2d 263 (10th Cir. 1969) cert. denied 396 U. S. 935 (1969). Habeas corpus is not available to set aside a conviction on the basis of erroneous jury instructions unless the error has such an effect on the trial as to render it so fundamentally unfair that it constitutes a denial of a fair trial in a constitutional sense. Martinez v. Patterson, 371 F.2d 815 (10th Cir. 1966); Woods v. Munns, 347 F.2d 948 (10th Cir. 1965); Alexander v. Daugherty, 286 F.2d 645 (10th Cir. 1961) cert. denied 366 U. S. 939 (1961); Linebarger v. State of Oklahoma, 404 F.2d 1092 (10th Cir. 1968) cert. denied 394 U. S. 938 (1969).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Billy Gene Marshall be and it is hereby denied and the case is dismissed.

Dated this 26th day of June, 1978, at Tulsa, Oklahoma.

Allen E. Barrow

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RUSH O. NICHOLS, # 234989, Petitioner,	)	
v.	)	No. 78-C-127-C
W. J. ESTELLE, JR., et al., Respondents.	)	

ORDER

This is a proceeding brought pursuant to the provisions of 28 U.S.C. § 2254 by a state prisoner confined in the Texas State Penitentiary at Huntsville, Texas, pursuant to conviction in the State of Texas.

The petitioner contends that his 1965 conviction for robbery with firearms on his plea of guilty in Case No. 21,450, in the District Court of Tulsa County, Oklahoma, was in violation of his rights guaranteed by the Constitution of the United States of America. Petitioner admits that the sentence on this Oklahoma conviction has been fully served. However, he asserts that the Oklahoma conviction was used to increase his punishment on the Texas conviction and, therefore, this Court has jurisdiction to hear his Petition for Writ of Habeas Corpus. Petitioner states that he has exhausted his state of Oklahoma remedies by direct appeal, Nichols v. State, Okl. Cr., 415 P.2d 184 (1966), and by a petition for writ of habeas corpus, Nichols v. Page, Okl. Cr., 441 P.2d 470 (1968). Petitioner also asserts that he has exhausted his remedies in the State of Texas by direct appeal and writ of habeas corpus to the U. S. District Court in Abilene, Texas.

Petitioner raises the following claims as violations of his rights guaranteed by the Constitution of the United States in the Oklahoma conviction:

1. He was denied effective assistance of counsel when the Oklahoma State Trial Court refused to grant a continuance to permit newly appointed counsel time to prepare, and to obtain the chief defense witness who was in the hospital at the time of the trial. Also his attorney did not file a brief on appeal which resulted in his appeal being dismissed.

2. He was denied counsel and oral argument in the Oklahoma State habeas corpus proceeding.

3. He was not advised of his constitutional rights by the Oklahoma Trial Court prior to his entering his plea of guilty. He did not fully understand the consequences of his plea of guilty and his plea was not completely voluntary on his part.

Petitioner has filed two prior § 2254 petitions in this Court, 73-C-367 and 74-C-488 which were consolidated and denied and dismissed without prejudice by Order entered and filed June 28, 1974. In that Order the Court held that the Petition for Writ of Habeas Corpus was premature due to the fact that Petitioner's Texas conviction was then on appeal and had not yet been decided. The Court mentioned but did not consider the jurisdictional question in its Order.

On July 22, 1974 and August 12, 1974, after the Texas appeal had been decided adversely to Petitioner, the Petitioner filed "Petitions for Rehearing" which were denied by Order entered August 20, 1974 on the ground that the Petitions for Rehearing were "out of time". Petitioner again filed a Petition for Rehearing on September 25, 1974 which was also dismissed on the ground that the petition was "out of time" by the Order of the Court filed January 3, 1975.

Touching first on the jurisdictional question the Court finds that neither the Petitioner nor the custodian of the Petitioner are within the jurisdiction of this court. Title 28 U.S.C. § 2241 provides as follows:

> "Writs of habeas corpus may be granted by * * * the District Courts * * * within their respective jurisdictions."

In the case of Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973) the Supreme Court stated:

> "So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction."

See also Lee v. United States, 501 F.2d 494 (8th Cir. 1974); Propotnik v. Putnam, 538 F.2d 806 (8th Cir. 1976); Andrina v. United States Board of Parole, 550 F.2d 519 (9th Cir. 1977); U. S. v. Monteer, 556 F.2d 880 (8th Cir. 1977); Cf. Jackson v. State of Louisiana, 452 F.2d 451 (5th Cir. 1971).

The Court therefore finds that the Petition for Writ of Habeas Corpus should be dismissed for lack of jurisdiction.

Additionally, it is noted that even if the Court had jurisdiction to consider the Petition for Writ of Habeas Corpus, the Petition should nevertheless be denied for the reason that in the Petition for Writ of Habeas Corpus presently before the Court the Petitioner states that he has heretofore filed a Petition for Writ of Habeas Corpus in the United States District Court in Abilene, Texas and further stated:

> "That Court held an evidentiary hearing, and would not consider the validity of the Oklahoma Conviction. Ruleing (sic) instead as the state argued. That there was other prior convictions that could have been used for enhancement useing, (sic) Cline v United States 453 F.2d 873 (1972), and Webster v Estelle 505, F.2d 926 (1974) this was cause No. CA-1-75-12;
>
> Petitioner appealed and in light of a prior case, Mays vs Estelle 505 F.2d 116; The Federal district Court in Abilene granted your Petitioner a certificate of probable cause to the 5th Circuit Court of Appeals.

> The 5th Cir denied your petitioner in Cause No. 76-3108 because of a recent Supreme Court ruleing (sic) in Wainwright vs Sykes _____U.S._____1977; The Supreme Court ruled where a constitutional violation was not objected to a trial, it can not (sic) be brought into federal court on habeas corpus, unless the cause prong and prejudist prong are shown. The prejudist prong is self evident in that it resulted in an automatic life sentence.
>
> Your petitioner filed a writ of certiorari in the U.S. Supreme Court No. 77-5717 asking the Supreme Court to reverse and remand the case back to the sentencing court to determine the cause prong of the case. The Supreme Court ruled that objecting to a prior conviction is a defensive matter and therefore properly the consern (sic) of court appointed trial counsel. Certiorari was denied. Your petitioner could have proved the cause prong only by ineffective assistance of counsel on the conviction an allegation not exhausted in the state courts.
>
> Your petitioner here in beleves (sic) he has complyed (sic) with all of this honorable Court requests in its "order" handed down on the 28th day of June 1974, And it is evident the State Court in Texas will give your petitioner no consideration untill (sic) the validity of this case is decided."

In view of the fact that the United States District Court in Abilene, Texas conducted an evidentiary hearing and apparently held against Petitioner on the basis of Cline v. United States, 453 F.2d 873 (5th Cir. 1972) and Webster v. Estelle, 505 F.2d 926 (5th Cir. 1974), the Petition for Writ of Habeas Corpus should be denied under Rule 9 of the federal rules governing § 2254 cases, which provides as follows:

> "(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits * * * ."

Accordingly the Petition for Writ of Habeas Corpus is denied.

IT IS SO ORDERED this 26th day of June, 1978.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA BEVERAGE COMPANY, Plaintiff, vs. DR. PEPPER LOVE BOTTLING COMPANY (of Muskogee), a Partnership Consisting of K. C. Love, Sr. and Violet Mills Love of Muskogee, Oklahoma, et al., Defendants.	)	No. 74-C-170 (BOH)

J U D G M E N T

Based upon the Findings of Fact and Conclusions of Law filed herein this date,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff Oklahoma Beverage Company have judgment against the defendants, Dr. Pepper Love Bottling Company (of Muskogee), a partnership, now a corporation, consisting of K. C. Love, Sr. and Violet Mills Love, jointly and severally, for damages in the sum of $5,607.10; and attorney fees in the sum of $22,500.00 together with interest thereon as provided by law.

Plaintiff's claims for damages for trademark infringement and loss of profits based upon its inability to expand its business are dismissed without prejudice.

Dated this 22nd day of June, 1978.

Luther Bohanon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA BEVERAGE COMPANY,

Plaintiff,

vs.

DR. PEPPER LOVE BOTTLING COMPANY (of Muskogee), a Partnership Consisting of K. C. Love, Sr. and Violet Mills Love of Muskogee, Oklahoma, et al.,

Defendants.

No. 74-C-170 (BOH)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having carefully reviewed the entire record in this case, including testimony, exhibits, and counsels' arguments adduced at the May 10, 1978, hearing on this matter, the court enters the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff, Oklahoma Beverage Company, brought this action in the United States District Court for the Northern District of Oklahoma on April 16, 1974, to determine all parties' rights in and to the registered trademark "LOVE" Beverages. Plaintiff charged defendants with unfair competition and unlawful interference in plaintiff's business, and sought cancellation of a state trademark registration allegedly wrongfully procured by the defendants.

2. On November 4, 1975, the case was tried to this court, and on December 19, 1975, the court entered Findings of Fact and Conclusions of Law and Judgment in plaintiff's favor.

3. By obtaining a naked assignment from plaintiffs' predecessors of plaintiffs' registered trademark "LOVE" Beverages, and by causing that assignment to be recorded in the United States Patent and Trademark Office, defendants have engaged in a willful course of conduct deliberately designed to interfere with plaintiff's trademark.

4. The defendants further sought and obtained a state trademark registration via a false declaration of sole ownership.

5. The defendants then wilfully and deliberately sought to assert their naked, ineffective assignment and their state trademark registration against the company which manufactured bottles for plaintiff bearing the "LOVE" Beverages trademark, thereby forcing plaintiff to agree to indemnify said supplier against the wrongful assertions of the defendants.

6. This court's Judgment of December 19, 1975, found defendants liable to plaintiff for unfair competition and inducement of breach of contract. Issues as to damages were reserved for further hearing.

7. Such Judgment was subsequently appealed and affirmed by the Tenth Circuit Court of Appeals.

8. On August 19, 1977, plaintiff filed its Statement of Damages with the court.

9. On May 10, 1978, an evidentiary hearing as to such statement was conducted.

10. Plaintiff incurred actual damages for preparation of trial exhibits in the amount of $352.00.

11. Plaintiff suffered actual damages in the amount of $2,200.00 for other attorney incurred-costs in this litigation.

12. Plaintiff incurred actual damages in the amount of $2,000.00 as the reasonable value of the presence of plaintiff's president in connection with this litigation.

13. Plaintiff incurred actual damages in the amount of $1,500.00 for accounting and clerical expenses in connection with this litigation.

14. Plaintiff's total litigation expense of $6,052.00, as detailed above, is reduced by the $444.90 of previously awarded court costs, leaving a balance of $5,607.10.

15. A reasonable attorney fee for the services of plaintiff's attorney is $22,500.00.

Conclusions of Law

1. The court has jurisdiction over the parties and subject matter of this suit and venue is properly laid in this judicial district.

2. Plaintiff is entitled to recover damages for the wilfull and deliberate acts of unfair competition perpetrated by the defendants, including a reasonable attorney fee. Paddington Corporation v. Major Brands, Inc., 359 F.Supp. 1244 (W.D. Okla. 1973); Petersen v. Fee International, Ltd., 381 F.Supp. 1071 (W.D. Okla. 1974); 78 O.S. § 54.

3. Although attorney fees are not provided for in actions solely for trademark infringement, 15 U.S.C. § 1114, et seq.; Maier Brewing Co. v. Fleischmann Distilling Corp., 359 F.2d 156, aff'd. 386 U.S. 714 (1967), this action is not solely for the infringement of the registered trademark. This case arose by virtue of the interference by the defendants with the plaintiff's business and ownership of the trademark under 15 U.S.C. § 1051.

4. Attorney fees are properly awarded where a suit is provoked by the acts of the defendants, Friend v. H. A. Friend and Company, 416 F.2d 526 (9th Cir. 1969), cert denied 397 U.S. 914 (1970).

5. Attorney fees are properly awarded in cases of unfair competition under 78 O.S. §54, Paddington Corporation v. Major Brands, Inc., supra; Petersen v. Fee International, Ltd., supra.

6. Plaintiff is awarded its actual damages in the amount of $5,607.10 for litigation expenses.

A judgment will accordingly be entered herein.

Dated this 22nd day of June, 1978.

Luther Bohanon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY WAYNE ELLINGTON, Petitioner,

v.

RICHARD A. CRISP, et al., Respondents.

NO. 77-C-407-B

O R D E R

This is a proceeding pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Petitioner, Gary Wayne Ellington. Petitioner is confined at the Oklahoma State Penitentiary, McAlester, Oklahoma upon conviction by jury of Armed Robbery in violation of 21 O.S.A. 1971 § 801, and sentence to twenty (20) years confinement, in Case No. CRF-71-199, in the District Court of Ottawa County, Oklahoma.

Petitioner filed a direct appeal, Case No. F-73-286, and his conviction was affirmed. Ellington v. State, Okl. Cr., 516 P.2d 287 (1973). Prior to trial, Petitioner filed a petition for writ of habeas corpus in the District Court of Ottawa County, Oklahoma, contending the denial of a speedy trial. His petition was denied and he did not appeal. He did not raise the issue during trial or in his direct appeal. He did file a post-conviction proceeding in the District Court of Ottawa County which after evidentiary hearing was denied by Order dated December 22, 1975. He appealed, Case No. PC-76-37, and the post-conviction denial was affirmed by the Oklahoma Court of Criminal Appeals. Ellington v. Crisp, Okl. Cr., 547 P.2d 391 (1976). His application for reconsideration was denied by the Oklahoma Court of Criminal Appeals by Order dated March 26, 1976.

Petitioner contends that his rights guaranteed by the Constitution of the United States were violated in the State conviction, and he demands his release from custody based on the sole ground as follows:

> He was denied his fundamental right to a speedy trial and determination of guilt expressly guaranteed by the Sixth Amendment to the United States Constitution. Petitioner asserts that he was unaware of the indictment against him filed April 1, 1971, until February 9, 1972, and that he was not tried until March, 1973, thereon, during which delay three alibi witnesses died resulting in overwhelming prejudice to his defense.

In United States v. Hay, 527 F.2d 990 (10th Cir. 1975) cert. denied 425 U. S. 935 (1976), it was held that the question as to whether an accused's right to a speedy trial has been violated depends primarily on balancing the reasons for delay against the prejudice to the accused.

In this balancing, the Court must assess the factors suggested by the Supreme Court in Barker v. Wingo, 407 U. S. 514, 530 (1972):

> "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

Also see, Strunk v. United States, 412 U. S. 434 (1973); United States v. Ramirez, 524 F.2d 283 (10th Cir. 1975); United States v. Latimer, 511 F.2d 498 (10th Cir. 1975); United States v. Goeltz, 513 F.2d 193 (10th Cir. 1975) cert. denied 423 U. S. 830 (1975); United States v. Mackay, 491 F.2d 616 (10th Cir. 1973) cert. denied 416 U. S. 972, 419 U. S. 1047 (1974).

The period of time between the filing of the complaint, April 5, 1971, and the trial, March 15, 16, 19 and 20, 1973, was almost two years. However, the time about which we are most concerned is the period of approximately eight months from the filing of the complaint April 5, 1971, until the Petitioner was informed of the charges on February 9, 1972. During this period, the Petitioner's original custody was in Nowata County on charges facing him there. From Nowata County, he was next transferred to the Tulsa County Jail to face charges in Tulsa, Oklahoma, and a detainer from Ottawa County was placed in Tulsa County. In December, 1971, some eight months later, the Ottawa County Sheriff's office checked on the detainer and discovered Petitioner was in the State penitentiary at McAlester, Oklahoma, serving his sentence on the Tulsa County charges, and a detainer was placed at the State prison. Some two months later, February 9, 1972, Petitioner first learned of the detainer. He was picked up March 1, 1972, on the pending Ottawa County charges. From that point forward to trial, Petitioner is equally, if not more, responsible for the delay to the March 15, 1973, trial date than the prosecution. His retained counsel withdrew and new counsel was appointed. He was released on bond on June 21, 1972, on the Ottawa County charge. Also, on June 21, 1972, he was picked up on a fugitive warrant on charges pending in Montgomery County, Kansas. From June 21, 1972, forward, any incarceration he suffered was not from the proceedings in Ottawa County. There were numerous pre-trial motions including two defense motions for continuance. It is true that mere incarceration in another jurisdiction, or on other charges, does not absolve a prosecutor from endeavoring to

secure the presence of an accused for trial. See, Smith v. Hooey, 393 U. S. 374 (1969); Dickey v. Florida, 398 U. S. 30 (1970). However, clearly, the delay herein from April 5, 1971, to the notice to the Petitioner of the detainer on February 9, 1972, was not intentional on the part of the State in order to infringe the Petitioner's rights or to gain some tactical advantage, place him at a disadvantage in conducting his defense, or to harass him. Nevertheless, the unintentional delay, though weighing less heavy than intentional delay, is the State's responsibility rather than the Petitioner's. However, the delay here cannot be held to weigh heavily against the State or for dismissal of the case. There assuredly was no anxiety and concern of the accused since he admits that he did not know of the charges until February 9, 1972. Thereafter, he, himself, as a result of his motions, seeking continuances, and participating fully in the procedures which produced the delay from February 9, 1972, to trial commencing March 15, 1973, in effect lost his right to object. Pretrial incarceration from this charge was minimal as was the anxiety and concern of the Petitioner. From review of the trial transcript, although much was made by defense counsel of dimmed memories and inability to recall specifics, it appears from the proof that the delay was an advantage rather than an impairment to the defense. Petitioner's picture had been picked as one of the two persons who committed the crime by the victims from 12 to 15 photographs viewed by the victims within a week of the crime, and the in-court identification was unhesitating and absolute. The testimony that would purportedly have been given by the deceased alibi witness "Toots" was clearly refuted on the record. Petitioner claims that two more defense witnesses died before he was brought to trial. He does not name these witnesses or allege any facts to which they could have testified, facts that if proved, would entitle Petitioner to relief. Reading this pro se petition liberally as required by Haines v. Kerner, 404 U. S. 519 (1972), the Petitioner's conclusary allegations, totally devoid of factual basis, are insufficient to entitle him to an evidentiary hearing in this Court. See, Atkins v. State of Kansas, 386 F.2d 819 (10th Cir. 1967); Ward v. Page, 424 F.2d 491 (10th Cir. 1970).

It is true that Petitioner's retained counsel filed a petition for writ of habeas corpus in the District Court of Ottawa County asserting

denial of a speedy trial on the ground that charges had been filed and Petitioner kept uninformed from April 5, 1971, to February 9, 1972. Following hearing thereon on June 5, 1972, the petition was denied. The denial was not followed by Petitioner's seeking a speedy trial and the issue was not again raised at trial or on direct appeal.

The petition, response, and complete file including the transcripts of the trial, habeas corpus hearing and post-conviction proceeding have been carefully reviewed, and being fully advised in the premises, the Court finds that an evidentiary hearing is not required and that the habeas corpus petition is without merit and should be denied.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Gary Wayne Ellington be and it is hereby denied and the case is dismissed.

Dated this 22nd day of June, 1978, at Tulsa, Oklahoma.

Allen E. Barrow

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

POSTAL FINANCE COMPANY, INC., a Corporation, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 77-C-395-C
JOAN FOX, LORENZO GREEN and MIRIAM GREEN, Defendants,	)	
and UNITED STATES POSTAL SERVICE, Garnishee.	)	

FILED

JUN 22 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

NOW on this 22nd day of June, 1978, there came on for consideration the Stipulation For Dismissal entered into by and between Postal Finance Company, Inc., a corporation, Plaintiff, and United States Postal Service, Garnishee. The Court finds this case should be dismissed upon such stipulation.

NOW, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be and the same is hereby dismissed, without prejudice.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KATHERINE A. WOODRING and LEO WOODRING, Plaintiffs,	)	
vs.	)	No. 78-C-99-C
THE UNITED STATES OF AMERICA (U.S. Postal Service), Defendant.	)	

O R D E R

Plaintiffs have brought the above-captioned action pursuant to the provisions of the Federal Tort Claims Act. Now before the Court is the defendant's Motion to Dismiss this action insofar as the plaintiff Leo Woodring is concerned, on the ground that he has not filed a claim with the federal agency involved herein.

The plaintiff Leo Woodring having confessed defendant's Motion to Dismiss, it is hereby ordered that defendant's Motion to Dismiss is sustained. This dismissal shall be without prejudice.

It is so Ordered this 21st day of June, 1978.

H. DALE COOK
United States District Judge

6.

TJE:mw
5/16/78

FILED

JUN 21 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE FEDERAL DISTRICT COURT OF THE NORTHERN DISTRICT OF OKLAHOMA

H. O. PEET & CO., INC., a corporation, Plaintiff,	)	
vs.	)	No. 77-C-467-B
JACK C. BROWN, Defendant.	)	

STIPULATION ~~FOR~~ OF DISMISSAL

It is hereby stipulated between the parties to the above-entitled action that all claims of Plaintiff have been fully compromised and satisfied, and that the above-entitled action be, and it is hereby, dismissed with prejudice, each party to bear his own cost.

The Clerk of the above-entitled Court is hereby authorized and directed to enter of record in the above-entitled action this Dismissal With Prejudice.

Dated May 15, 1978.

Attorney for ~~Plaintiff~~ Plaintiff

Attorney for Defendant

LAW OFFICES
UNGERMAN, UNGERMAN, MARVIN, WEINSTEIN & GLASS
SIXTH FLOOR WRIGHT BUILDING
TULSA, OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONAL E. WOFFORD, Plaintiff,	)	
vs.	)	No. 76-C-595-C
BEN W. DEAN, DALE M. SMITH, BETTY I. STEPANEK, CLAUDE W. PEAKE, ROUNDS & PORTER PROFIT SHARING PLAN AND TRUST and ROUNDS & PORTER LUMBER COMPANY, INC., Defendants.	)	

J U D G M E N T

This is an action brought under The Employee Retirement Income Security Act of 1974, Title 29, U.S.C. § 1001, et seq. (ERISA), for declaratory judgment in which the plaintiff seeks injunctive relief and, in the alternative, a monetary judgment. The action is founded upon plaintiff's contended rights under the Rounds Profit Sharing Plan and Trust.

The plaintiff contends that with regard to the method of distribution of his vested account in the Trust, he is entitled to a distribution in the form of a lump sum payment.

It is contended by the plaintiff that the Advisory Committee, composed of defendants Ben W. Dean, Dale M. Smith and Betty I. Stepanek, fiduciaries under the Plan, failed to act solely in the interest of the plaintiff in making its determination as to the type of distribution of plaintiff's vested individual account balance when it selected a distribution in the form of a ten-year certain and life annuity for the plaintiff. Plaintiff contends that the Advisory Committee, and each member thereof, breached their fiduciary responsibility to the plaintiff as set forth and provided by Title 29, U.S.C. § 1104(a)(1).

The defendants, including the plan sponsor, the Rounds & Porter Lumber Company, Inc., and the Trustee of the Rounds Profit Sharing Trust, Claude W. Peake, deny that they breached their

duty to the plaintiff as their duties are prescribed under § 1104(a)(1).

Plaintiff contends that the Advisory Committee, as fiduciaries, must exercise the discretion granted to them under the profit sharing plan, with respect to the distribution of the benefits provided in the plan, so as to provide the plaintiff beneficiary with the form of distribution which is best for the plaintiff in accordance with the fiduciary standards set forth at 29 U.S.C. § 1104(a)(1).

Defendants contend that § 1104(a)(1) provides a fiduciary standard for the Advisory Committee which requires them to make reasonable and prudent policies and determinations considering the interests of the participants and beneficiaries and that the fiduciary standards do not require them to make an individual determination each time a distribution is appropriate under the Plan as to what course of action would best benefit a particular participant or beneficiary.

FINDINGS OF FACT

Rounds & Porter Lumber Company, Inc. is an employer engaged in commerce and in an industry affecting commerce, as such terms are defined by Title 29, U.S.C. §§ 1002(3), 1002(11), 1002(12) and 1003(a)(1).

The Rounds Profit Sharing Plan is an employee benefit plan as defined in Title 29, U.S.C. § 1002(3).

The plan is, and at all times material to the subject matter of this case, was an individual account or defined contribution plan and a type of pension plan within the meaning of Title 29, U.S.C. § 1002(34). and tax qualified under § 401(a) of the Internal Revenue Code.

The plaintiff was an employee of the Rounds & Porter Lumber Company at Tulsa, Oklahoma, from April of 1961 through June 15, 1975, at which time he voluntarily terminated his employment with the company.

Rounds & Porter Lumber Company, Inc. was and is the Plan sponsor as defined by 29 U.S.C. § 1002(16)(b).

Claude W. Peake is a trustee and fiduciary of the Plan, but only with respect to the scope of the duties and responsibilities delegated to him by the company and under the provisions of the Plan.

Ben W. Dean, Dale M. Smith and Betty I. Stepanek were also members of the Advisory Committee of the Plan and were fiduciaries as defined by Title 29, U.S.C. § 1002(21)(a), but only with respect to the scope of their duties and responsibilities as delegated to them by the company and under the provisions of the Plan.

On March 1, 1978, the vested non-forfeitable balance of plaintiff's individual account with the Rounds Profit Sharing Plan and Trust was $28,692.98.

The plaintiff was employed by Rounds & Porter Lumber Company, Inc. for more than twelve (12) continuous years from April 1, 1961 through June 15, 1975, and his individual account in the Plan was fully vested and non-forfeitable.

The plaintiff had been offered, but refused to accept, the type of distribution of his vested account in the Plan tendered to him in the form determined by the Advisory Committee, and such refusal continues to this date. The tender of the Advisory Committee continues to this date.

The Plan provides for three alternate methods of distribution of a participant's vested account balance on a participant's distribution date, which are:

(1) The purchase of a retirement annuity in any form for a period of time then available from the Insurance Company;

(2) One lump sum payment; or

(3) Monthly installment payments over any period not exceeding ten (10) years.

The Plan also provides that the Advisory Committee is given the sole discretion, except in the case of a participant's death, to determine which method of distribution shall be made as to each individual participant.

The form of distribution determined by the Advisory Committee and offered to the Plaintiff was a ten year certain and life annuity insurance contract. Pursuant to a group annuity contract with Connecticut General Life Insurance Company, the plaintiff has the option of changing the annuity commencement date of the ten-year certain and life annuity to the first day of any month following the date he elects to make such change, without cost to the plaintiff. In the event such election is made, the insurance company shall adjust the plaintiff's annuity to its actuarial equivalent by applying factors which the insurance company deems to be appropriate and equitable, as is the standard practice in the insurance industry.

On May 1, 1975, plaintiff requested in a letter to Mr. Peake that a lump sum distribution of his vested account be made to him. In that letter, he advised Mr. Peake that he had purchased the Wagoner Lumber Company and then said, "I would like to request a total withdrawal of my Profit Sharing. I am 39 years old and since Rounds & Porter Co. would have to maintain my profit sharing for the next 26 years, I hope the board can see this plus the fact, in a new business, I could sure use the money."

By letter dated June 13, 1975, the Advisory Committee, through Mr. Peake, as Trustee of the Rounds Profit Sharing Trust, informed the plaintiff that it had denied his request for the lump sum distribution and stated as follows:

> "Your request was thoroughly discussed, and it was unanimous consensus of the members of the Advisory Committee that such lump-sum distribution would not in conformity with the full intent and purposes of the Rounds Profit Sharing Trust as devised by its founder, Ralph M. Rounds, and, in particular, would be in conflict with that portion of the purposes which state 'to encourage continued service on the part of the employees . . .'"

In May of 1975, the plaintiff had conversations with Mr. Dean regarding the distribution of his account. Mr. Dean indicated that one reason for the denial of a lump sum distribution to the plaintiff was the Advisory Committee's fear that in exercising that option and the plaintiff receiving the account balance in a lump sum, other employees would take such distributions and leave the company.

It is clear that the plaintiff was aware throughout his term of employment with the Rounds & Porter Lumber Company, Inc. both from the printed pamphlets furnished to and distributed to the plaintiff and other participants describing the Plan and from meetings which the plaintiff attended, that the primary purpose of the Plan was to provide employees of the company with a guaranteed retirement income which would supplement any other income an employee might then be receiving.

It is clear that from the inception of the Plan through the time plaintiff terminated his employment the Advisory Committee maintained a standard policy in regard to the exercise of their discretion in making their distribution. The policy was; has been, and is to make lump sum distributions only in cases of death or disability of an employee or where the payments under the retirement annuity would provide for an annuity of less than $10.00 per month.

The Court finds that the decision of and exercise of discretion by the Advisory Committee in determining the type of distribution of plaintiff's account, in view of how such determination was made, the overall administration of the Plan, considering the Advisory Committee's historical

performance, and fully considering the interests of the participants and beneficiaries, was not arbitrary, capricious, unreasonable or made in bad faith. The fiduciaries' determination was made as reasonably prudent persons would make such determination under the circumstances of this Plan and the facts of this case.

CONCLUSIONS OF LAW

The Court concludes as a matter of law that the Court does have jurisdiction of the subject matter of this case under Title 29, U.S.C. § 1132(e)(1).

The fiduciary standards applicable to this case are found at Title 29, U.S.C. § 1104(a)(1) which provides, in part, as follows:

> "(a)(1) . . .[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investment of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title . . ."

OPINION

A study of the legislative history of the Employee Retirement Income Security Act of 1974, Title 29. U.S.C. § 1101, et

seq., commonly called "ERISA", indicates to the Court that Congress was clearly attempting, as its basic and fundamental premises in enacting the statutes, to prohibit practices of misappropriation of pension funds, diversion of funds to improper uses, and self-dealing by fiduciaries. H. R. Rep. No. 93-533, pp. 1-12; H. R. Rep. No. 93-1280, pp. 295, 301, 302 and 303; see also Lee, T. M. 308 (ERISA) Fiduciary Responsibility and Prohibited Transactions, p. A-1 - A-14 (1975).

The primary pre-ERISA standard of judicial review of pension fund fiduciary conduct was whether the actions of the fiduciaries were arbitrary, capricious, unreasonable or in bad faith, in light of all the circumstances involved. Norton v. IAM National Pension Fund, 553 F.2d 1352, 1356 (D.C. Cir. 1977); Phillips v. Kennedy, 542 F.2d 52 (8th Cir. 1976); Johnson v. Botica, 537 F.2d 930 (7th Cir. 1976); Pete v. UMWA Welfare and Retirement Fund of 1950, 517 F.2d 1264 (8th Cir. 1975); Beam v. International Organization of Masters, Mates and Pilots, 511 F.2d 975 (2d Cir. 1975); Giler v. Board of Trustees of Sheet Metal Workers Pension Plan, 509 F.2d 848 (9th Cir. 1975); Gaydosh v. Lewis, 410 F.2d 262 (D.C. Cir. 1969); Miniard v. Lewis, 387 F.2d 864 (D.C. Cir. 1957), cert. denied 393 U.S. 873; Gehrhardt v. General Motors Corp., 434 F.Supp. 981 (U.S.D.C. S.D.N.Y. 1977); Wilkett v. Davis, 442 F.Supp. 505 (U.S.D.C. E.D. Okla. 1977).

It seems to the Court that Congress through the standards of § 1104 was not attempting to interfere with the discretionary functions of fiduciaries when exercised in a reasonable, prudent way. Nor does the Court believe that Congress was attempting to interfere with the right of fiduciaries in exercising their discretion to choose between two or more acceptable, recognized and reasonable methods of investing

covered funds or distributing covered funds, so long as the ultimate investment or distribution of the funds was to the general benefit of the participants and beneficiaries of the fund.

For this Court to accept the plaintiff beneficiary's interpretation of the fiduciaries' responsibility under ERISA would require this Court to force the fiduciaries to exercise an impossible task to determine what is in each individual beneficiary's "best interest," and to be responsible for that determination.

It is almost impossible to define what is in an individual's "best interest," or what the fiduciaries would have to take into consideration to determine what is in one's "best interest" -- whether it's his business interest, his family interest, what in the long run would be best for him, or what in the short run would be best for him. Would the fiduciaries have to consider future business plans, land holdings, financial stability, and business capacity? If so, must the fiduciaries then determine that even though the beneficiary would be a good business manager, must they also determine where he intends to invest the distribution, the locale of the business, the stability of the community, his potential customers, or whether such business is even reasonable or feasible?

To adopt the position of the plaintiff that fiduciaries, in exercising their discretion as to alternate means of distribution, must act only in the best interest of the individual beneficiary concerned, would require not only that the fiduciaries exercise an almost impossible task but would require the federal courts to become, in essence, investment advisors over all trust funds relating to beneficiaries. Congress could not have intended so broad a fiduciary responsibility as plaintiff would have this Court accept.

A further effect of the adoption of plaintiff's interpretation of § 1104(a)(1) would almost mandate that the discretionary authority in the investment and distribution of trust funds under ERISA would be eliminated. As a practical matter, the litigation costs and the cost of administering the any sizeable fund whatsoever would be prohibitive if plaintiff's interpretation of § 1104(a)(1) were adopted. In fact, it might even destroy the funds themselves and act to the detriment of the other beneficiaries and participants. Certainly the elimination of the beneficial aspects of discretionary authority could not be in the best interest of the participants or the beneficiaries and would not fall, therefore, within the spirit and intent of Congress or the spirit of the Act itself.

The fact that the exercise of discretion may have an incidental benefit to the company does not mean that in every case the fiduciary exercising that discretion has violated the fiduciary standards of § 1104(a)(1). Toensing v. Brown, 374 F.Supp. 191 (U.S.D.C. N.D. Ca. 1974), aff'd. 528 F.2d 69 (9th Cir. 1975). The Court is caused to query whether, when a distribution is to be made, must the benefit to the participants be excluded and only the benefit to the beneficiaries be considered -- or whether, upon that distribution, the fiduciaries still have the responsibility to take into consideration the participants and the beneficiaries as a whole. If the latter be true, the continued employment of experienced individuals to maintain the business would be a most vital benefit to the participants. However, it is unnecessary to determine that issue in this particular case.

The fiduciaries in this case discharged their responsibilities and duties with respect to the exercise of their discretion in relationship to the distribution of the assets of the Plan, solely in the interest of the participants and

beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

It is, therefore, the determination of this Court that judgment be entered in behalf of the defendants and against the plaintiff.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

SIDNEY G. DUNAGAN of
Gable, Gotwals, Rubin, Fox,
Johnson & Baker
Attorney for Defendants

TED M. RISELING of
Kothe, Nichols & Wolfe, Inc.
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FAUNEAL PERKINS, and Others Similarly Situated,

Plaintiff,

vs.

CLIFFORD L. ALEXANDER, Secretary of the Army of the United States of America,

COL. ANTHONY SMITH, District Engineer, United States Army Corps of Engineers, Tulsa District, Tulsa, Oklahoma,

KLON D. BUCKLES, Civilian Personnel Officer, United States Army Corps of Engineers, Tulsa, District,

Defendants.

No. 78-C-26-C

O R D E R

Plaintiff brings the above captioned case pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e-5, 2000e-16). Plaintiff is employed by the United States Army Corps of Engineers, Tulsa District. She charges the defendants with discriminating against herself, and others similarly situated, on the basis of sex, in the areas of job training and promotion. Plaintiff also alleges that she and the other members of her class have suffered reprisals from the defendants as the result of their filing administrative complaints. Plaintiff prays for various forms of relief for herself and those she purports to represent, the same being back pay, an injunction against the alleged discriminatory practices, promotion, an order directing that the defendants provide equal job training, and punitive damages. Now before the Court are the motion of the defendant Alexander to dismiss the Complaint in regard to the defendants Smith and Buckles for failure to state a claim against them, the motion of the defendant Alexander to

dismiss the Complaint insofar as it may allege individual liability on his part, and the motion of the defendant Alexander to strike plaintiff's prayer for punitive damages.

The basic premise upon which all the defendant's motions are based is that Title VII of the Civil Rights Act of 1964, specifically Section 717 (42 U.S.C. § 2000e-16) provides the exclusive judicial remedy for claims of discrimination in federal employment. The Court finds that premise to be indisputable. See Brown v. Gen'l. Services Admn., 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976); Gissen v. Tackman, 537 F.2d 784 (3rd Cir. 1976).

Section 717(c)(42 U.S.C. § 2000e-16(c)) provides that the "head of the department, agency, or unit, as appropriate, shall be the defendant. . . ." in an action brought thereunder. The proper defendant in this action would therefore be the defendant Alexander, the Secretary of the Army. See Stephenson v. Simon, 427 F.Supp. 467 (D.D.C. 1976). Because of the pre-emptive nature of Section 717, the defendants Smith and Buckles would not therefore be proper parties defendant, and should be dismissed from this lawsuit.

Plaintiff cites the case of Miller v. Saxbe, 396 F.Supp. 1260 (D.D.C. 1975), for the proposition that Section 717 would not preclude an action for damages against other federal employees personally. Even assuming that the Miller court was correct in so holding, which is doubtful in light of the later holding of the Supreme Court in Brown, supra, the Miller case is distinguishable from the case at bar. That case included a claim for damages and injunctive relief pursuant to Title 42 U.S.C. § 1981 in addition to claims under Title VII. Eliminating plaintiff's prayer for punitive damages for the moment, the prayer here consists entirely of the types of equitable relief recoverable in a Title VII action. Plaintiff here makes no claim for actual damages pursuant to Section 1981.

It is difficult to clearly discern any claims made again

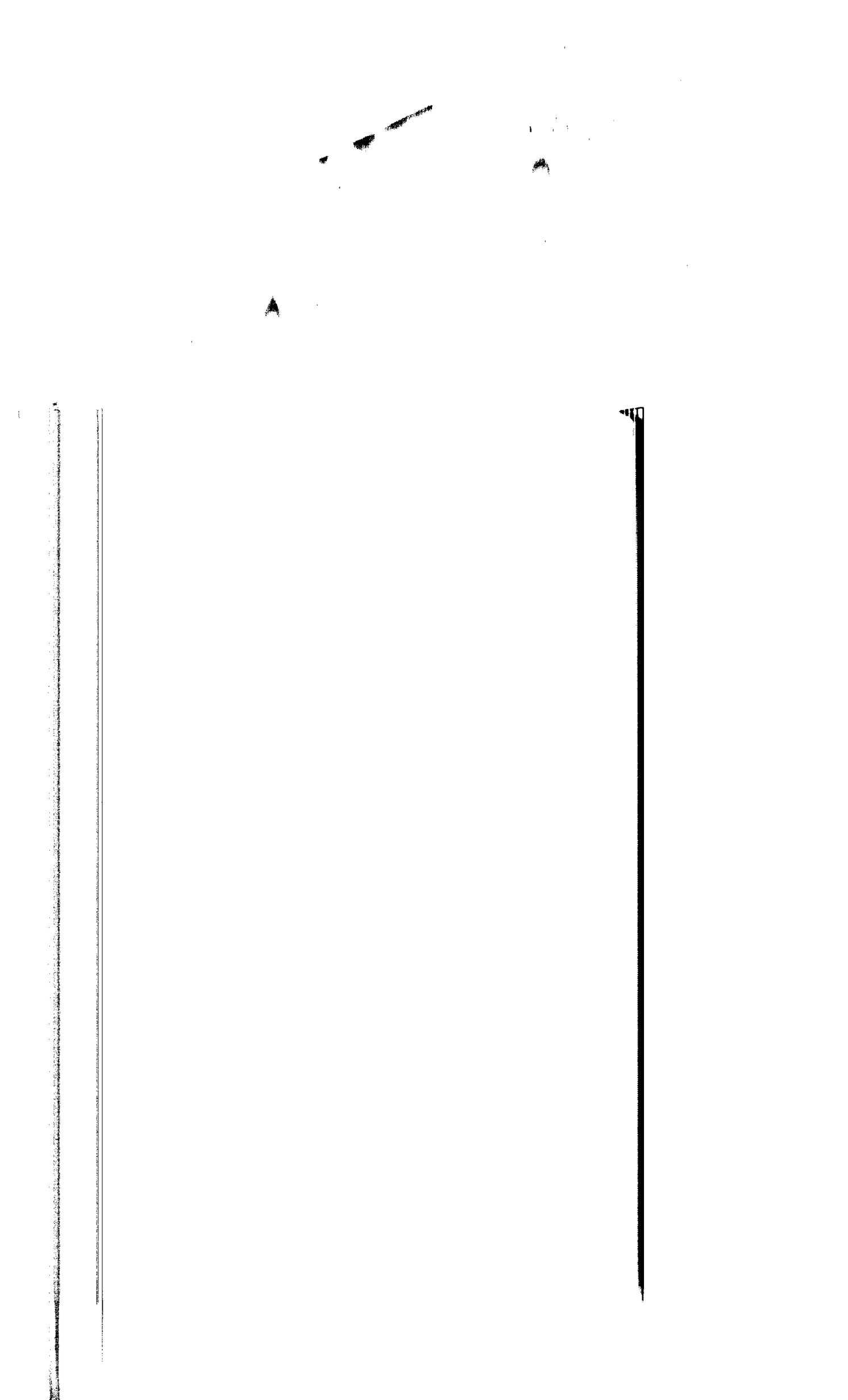
the defendant Alexander in his individual, as opposed to his official capacity. However, to the extent that plaintiff's Complaint does contain such claims, they should be dismissed. Section 717(c) allows suit against the head of a department, but only in his official capacity. See Keeler v. Hills, 408 F.Supp. 386 (N.D.Ga. 1975); Brooks v. Brinegar, 391 F.Supp. 710 (W.D.Okla. 1974).

Although there is authority from other courts to the contrary, it is well-settled in the Tenth Circuit that punitive damages or actual damages are not recoverable in a Title VII action. See Pearson v. Western Electric Co., 542 F.2d 1150 (10th Cir. 1976); Wright v. St. John's Hospital, 414 F.Supp. 1202 (N.D.Okla. 1976). Contra Claiborne v. Illinois Central R.R., 401 F.Supp. 1022 (E.D.La. 1975). Plaintiff's prayer for punitive damages should therefore be stricken.

For the foregoing reasons, it is therefore ordered that the motions of the defendant Clifford L. Alexander, Secretary of the Army, to dismiss the Complaint as against the defendants Smith and Buckles, to dismiss the Complaint insofar as it makes individual claims against him, and to strike plaintiff's prayer for punitive damages are hereby sustained.

It is so Ordered this 20th day of June, 1978.

H. DALE COOK
United States District Judge



IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JESSE BRASWELL and NOVELINE M. BRASWELL, if living, or if not, her unknown heirs, assigns, executors and administrators, Defendants.	)	CIVIL ACTION NO. 78-C-128-B

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 19th day of June, 1978, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendants, Jesse Braswell and Noveline M. Braswell, if living, or if not, her unknown heirs, assigns, executors and administrators, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Jesse Braswell and Noveline M. Braswell, if living, or if not, her unknown heirs, assigns, executors and administrators, were served by publication as shown on the Proof of Publication filed herein.

It appearing that the Defendants, Jesse Braswell and Noveline M. Braswell, if living, or if not, her unknown heirs, assigns, executors and administrators, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said promissory note upon the following described real property located in Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

The South Sixty-Five (65) feet of Lots Thirty (30), Thirty-One (31), and Thirty-Two (32), in Block Thirty-Eight (38), in the Original Town of Oilton, Oklahoma; LESS AND EXCEPT all gas, oil and minerals in and under said land.

THAT Clyde E. Braswell and Doris Braswell, husband and wife, did, on the 4th day of May, 1970, execute and deliver to the United States of America, acting through the Farmers Home Administration, their mortgage and promissory note in the sum of $7,900.00 with 6 1/4 percent interest per annum, and further providing for the payment of annual installments of principal and interest.

The Court finds that the Defendants, Jesse Braswell and Noveline M. Braswell, are the record owners of the property described herein and the Court also finds that said Defendants, Jesse Braswell and Noveline M. Braswell, assumed and agreed to pay the promissory note and mortgage herein being foreclosed by virtue of an Assumption Agreement dated May 11, 1973.

The Court further finds that Defendants, Jesse Braswell and Noveline M. Braswell, made default under the terms of the aforesaid promissory note by reason of their failure to make the annual installments due thereon, which default has continued and that by reason thereof, the above-named Defendants are now indebted to the Plaintiff in the amount of $4,090.65 as of January 23, 1978, plus $118.89 accrued interest as of January 23, 1978, plus daily interest accrual of $.7845 from and after January 23, 1978, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Jesse Braswell and Noveline M. Braswell, if living, or if not, her unknown heirs, assigns, executors and administrators, in rem, for the sum of $4,090.65 as of January 23, 1978, plus $118.89 accrued interest as of January 23, 1978, plus daily interest accrual of $.7845 from and after January 23, 1978, until paid,

plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

Allen E. Barrow
UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE
Assistant United States Attorney

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, ex rel., Department of Transportation of the State of Oklahoma; Plaintiff; vs. Certain parcels of land lying in Osage County containing 7.73 acres more or less; United States Department of the Interior, Bureau of Indian Affairs, Osage Agency, David L. Baldwin, Superintendent; and The United States of America; Defendants.	)	CIVIL ACTION NO. 78-C-150-B

ORDER OF DISMISSAL

On June 19th 1978, this matter comes on for disposition of the above named Defendants' Motion to Dismiss Action. Having reviewed the files in this action and being fully advised in the premises, the Court finds and concludes that:

On May 18, 1978, the above named Defendants filed their Motion to Dismiss, based upon the premise that the land involved is unallotted tribal lands, held in trust by the United States of America for the use and benefit of the Osage Tribe and therefore the State of Oklahoma cannot condemn such property. The Motion was accompanied by a brief setting forth the authorities upon which this Motion was based.

On May 23, 1978, at a hearing for appointment of Commissioners in this matter, counsel for Defendants orally requested a decision on their Motion to Dismiss before Commissioners were appointed.

At such hearing Mr. Spencer W. Lynn, Attorney, appeared for the Plaintiff. Upon inquiry by the Court Mr. Lynn advised that he knew of no authority contrary to the authority cited by the Defendants. The Court then decided to reserve decision on the Defendants' Motion to Dismiss for 10 days, and advised Mr. Lynn to

file any opposition and authorities he might find on the issue involved within such 10-day period. The Court further advised counsel that if no such authorities were filed by the Plaintiff, then after 10 days the Motion to Dismiss would be sustained.

The 10-day period has elapsed and the ~~Defendants~~ Plaintiffs (per me) have filed no objections or authorities in opposition to Defendants' position.

The Court has read and considered the Defendants' brief in support of their Motion and based upon the authorities cited therein concludes that the Motion to Dismiss should be sustained.

It Is Therefore ORDERED that this action is hereby dismissed.

Allen E. Barrow
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THEARTY HORTON, # 92020,
Petitioner,

v.

MACK H. ALFORD, Warden, Vocational Training Center, Stringtown, Oklahoma, et al.,
Respondents.

NO. 77-C-422-B

O R D E R

This is a proceeding pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis by Petitioner, Thearty Horton. Petitioner is confined at the Vocational Training Center, Stringtown, Oklahoma, pursuant to conviction by jury of robbery by fear in Case No. CRF-75-2854 in the District Court of Tulsa County, Tulsa, Oklahoma. He was sentenced therein to fifteen (15) years imprisonment.

Petitioner filed a direct appeal, Case No. F-76-671, and the Oklahoma Court of Criminal Appeals affirmed the Judgment and Sentence, reported Horton v. State, Okl. Cr., 561 P.2d 988 (1977). Thereafter, Petitioner filed an Application for Post-Conviction Relief which was denied by the District Court of Tulsa County, and the denial was affirmed by the Oklahoma Court of Criminal Appeals, Case No. PC-77-629.

Petitioner contends that his rights guaranteed by the Constitution of the United States were violated in the State conviction and demands his release from custody based on the following grounds upon which his State remedies have been exhausted:

1. Petitioner was prejudiced by the failure of the trial court to grant his motion for severance.

2. The trial court erred in refusing to give petitioner's requested instructions to the jury.

3. There was insufficient evidence to sustain the verdict. The State failed to prove its case-in-chief and the trial court erred in denying petitioner's demurrer and refusing to direct a verdict for petitioner.

4. The petitioner was denied a fair trial and the trial court allowed State's Exhibits 2 and 4 to be introduced into evidence.

Petitioner in his "Traverse" also asserts that the State Statute under which he stands convicted is unconstitutional due to vagueness, and that his Court-appointed counsel was incompetent and inadequate for failure to raise in the direct appeal the issue that the introduction

of the weapons constituted reversible error. These latter issues will not be considered herein as the Petitioner has not presented them to the State Courts by direct appeal or post-conviction procedure and his adequate and available State remedies have not been exhausted. No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U. S. 475 (1973). Further, the probability of success is not the standard to determine the adequacy of State remedies. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971).

The petition, response, "Traverse", and complete file, including the trial and preliminary hearing transcripts, have been carefully reviewed, and being fully advised in the premises, the Court finds that an evidentiary hearing is not required and the petition should be denied and the case dismissed.

The basic requirement established by the Supreme Court of the United States with respect to habeas corpus petitions is that State prisoners "are entitled to relief on Federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution." Townsend v. Sain, 372 U. S. 293 (1963). Where such fundamental rights have not been affected, the Petitioner is not entitled to use the Federal Courts as an additional appeal. Garrison v. Hudspeth, 108 F.2d 733 (10th Cir. 1939).

Petitioner's first contention that he was prejudiced by the denial of his motion for severance is without merit. It is true that the Petitioner's co-defendant took the witness stand and his testimony was impeached by the introduction of a prior conviction. However, taking all of the facts together, no prejudice to Petitioner is found that would have required a severance in the circumstances of this case, and there was no abuse of discretion in the Trial Court's denial of severance. See, Curcie v. State, Okl. Cr., 496 P.2d 387 (1972); Parker v. United States, 404 F.2d 1193 (9th Cir. 1968); United States v. Eaton, 485 F.2d 102 (10th Cir. 1973).

The second contention is that the Trial Court erred in refusing to give Petitioner's requested instructions. This Court agrees with the Oklahoma Court of Criminal Appeals that the requested instructions were properly refused by the Trial Court. Even if the Trial Court's failure to give Petitioner's requested instructions were to be considered error, habeas corpus is not available to set aside a conviction on the basis of erroneous jury instructions unless the error had such an effect on the trial as to render it so fundamentally unfair that it constituted a denial of a fair trial in a constitutional sense. Linebarger v. State of Oklahoma, 404 F.2d 1092 (10th Cir. 1968) cert. denied 394 U. S. 398 (1969); Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971); Poulson v. Turner, 359 F.2d 588 (10th Cir. 1966). Habeas corpus is not a substitute for appeal, therefor, matters involving trial errors may not be reviewed collaterally. Chavez v. Baker, 399 F.2d 943 (10th Cir. 1968) cert. denied 394 U. S. 950 (1968).

The third contention that there was insufficient evidence to convict is without merit. A conviction is not subject to review in Federal habeas corpus unless the record is so totally devoid of evidentiary support as to raise a due process issue. Mathis v. People of the State of Colorado, 425 F.2d 1165 (10th Cir. 1970); Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970).

The fourth contention involves the admission into evidence of State's Exhibit 2, a .32 caliber pistol taken from the Petitioner, and Exhibit 4, a .45 caliber automatic pistol taken from the co-defendant. It is clear from the record in this case that the introduction of these exhibits, if error, was not error of constitutional magnitude. The admissibility of evidence is a question of state law and procedure not involving Federal constitutional issues. Only in circumstances which impugn fundamental fairness or infringe upon specific constitutional protections is a Federal question presented. When such circumstances do not exist, Federal habeas corpus does not serve as an additional appeal. United States ex rel Harris v. State of Illinois, 457 F.2d 191, 198 (7th Cir. 1972); Grundler v. State of North Carolina, 283 F.2d 798, 800 (4th Cir. 1960); Cobarrubio v. Aaron, No. 76-2112 Unreported (10th Cir. filed July 27, 1977).

IT IS, THEREFORE ORDERED that the petition for writ of habeas corpus

pursuant to 28 U.S.C. § 2254 of Thearty Horton be and it is hereby denied and the case is dismissed.

Dated this 14 day of June, 1978, at Tulsa, Oklahoma.

Allen E. Barrow

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 16 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

B-F-W CONSTRUCTION CO., INC., a Texas corporation,

Plaintiff,

vs.

OKLAHOMA CONCRETE PRODUCTS CORP., a suspended Oklahoma corporation; ROBERT L. BRASE d/b/a Oklahoma Concrete Products; J. HOYL LOCKETT d/b/a Oklahoma Concrete Products; and PRE-ENGINEERED BUILDING PRODUCTS, INC., an Oklahoma corporation, d/b/a Oklahoma Concrete Products,

Defendants.

No. 78-C-216-C

JUDGMENT OF DEFAULT

Defendant Oklahoma Concrete Products Corp. has been regularly served with process. It has failed to appear and answer the plaintiff's complaint filed herein. The default of defendant Oklahoma Concrete Products Corp. has been entered. It appears from the affidavit in support of entry of default judgment that the plaintiff is entitled to judgment.

IT IS ORDERED AND ADJUDGED that plaintiff recover from defendant Oklahoma Concrete Products Corp. the sum of $265,001.00, with interest thereon at the rate of ten percent per annum from June 16, 1978, until paid, together with the costs of this action.

DATED this 16th day of June, 1978.

Jack C. Silver, Clerk

UNITED STATES DISTRICT COURT CLERK
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROBERT EARL JOHNSON, Petitioner, v. THE STATE OF OKLAHOMA, ET AL., Respondents.	)	No. 77-C-492-C

ORDER

This is a proceeding brought pursuant to the provisions of Title 28 U.S.C. § 2254, by a state prisoner confined at the Oklahoma State Penitentiary, McAlester, Oklahoma. Petitioner attacks the validity of the judgment and sentence rendered and imposed by the District Court of Tulsa County, Oklahoma in Case No. CRF-76-3168. Respondents filed their response herein pursuant to the Order of the Court to show cause. Petitioner thereafter filed a "Traverse to Response".

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights under the Constitution of the United States of America. In particular, petitioner claims:

> That his plea of "nolo contendre (sic) was not made intelligently and that the trial court abused it's descrestion (sic) in not allowing the Plea to be withdrawn", in that the Court allowed the "results of a polygraph examination to be determinate of a plea bargain when the agreement was not kept regarding the presence of Counsel during polygraph examination."

Petitioner entered a plea of nolo contendere on March 14, 1977 in the state court case in which he was charged with the offense of larceny of merchandise from a retailer after former conviction of a felony, and was sentenced on April 13, 1977 to a term of 10 years imprisonment. On July 8, 1977, Petitioner filed a Petition for Writ of Certiorari

in the Oklahoma Court of Criminal Appeals which petition was denied on September 9, 1977.

The record in this case shows that at the March 14, 1977 hearing the defendant was represented by Assistant Public Defender Richard Hoffman; that Mr. Hoffman advised the Court that the Petitioner (defendant) desired to enter a plea of nolo contendere. In that connection the transcript shows the following statement by Mr. Hoffman to the Court and the Court's response:

> "At this time Mr. Johnson wishes to enter a plea of nolo contendere in this case.
>
> I've explained to him this means we will simply not put up a defense in this case pursuant to negotiations between myself and Mr. Gillert. The plea negotiations and the entering of the nolo contendere is that Mr. Johnson will be allowed to take a lie detector inspection, a polygraph test, which will be run by Mr. Horn of the police department. I will be as close to the administration of the administering of the polygraph test as feasible for the running of the machine; that if the results of the examination are conclusive that Mr. Johnson was involved in the action alleged that he'll be sentenced to ten years with the Department of Corrections to run consecutive with the previous jury trial verdict. If they conclude he was not involved in the alleged action, in the incident alleged, that he will be allowed to withdraw his plea of nolo contendere and the case will be dismissed. If the results are not conclusive, then he is to be allowed to withdraw his plea and have a regular setting for a jury trial, in that the polygraph test would not have given us a satisfactory results for either of the previous conclusions to the matter.
>
> I've explained this to Mr. Johnson and his only concern is that it should be done legitimately, and on the up and up. That is the reason he wishes that I be as close as possible to the administration of the polygraph, for the purpose of protecting him in terms of that.
>
> * * * * * * *
>
> "THE COURT: Do you understand, Mr. Johnson, that as far as the polygraph is concerned, under the law of the State of Oklahoma this could not be used even if by agreement of counsel sofar (sic) as its introduction into evidence at a jury or nonjury trial?

THE DEFENDANT: Evidently, yes.

THE COURT: Evidently, this has been worked out with your attorney and with the district attorney for your benefit. If you are innocent of this charge and it so shows on the polygraph, it will be dismissed and the Court will see that the case is dismissed. So it is for your benefit that you have this polygraph test, I assume. Is it your desire to do it?

THE DEFENDANT: It's my desire.

THE COURT: And as counsel stated?

THE DEFENDANT: Yes."

(Tr. of March 14, 1977 2-4).

The Court then advised the defendant of his right to a jury trial; that this was a right he would have to waive if he desired to persist in his plea of nolo contendere; that his plea of nolo contendere is treated the same as a plea of guilty; that he would be offering no defense to the charge of larceny of merchandise from retailer, the charge with which he was charged in the information; and that the Court could sentence him to a term of 10 years on his plea of nolo contendere. The defendant stated that he understood his rights and answered affirmatively to each of the court's questions concerning his rights. The Court further inquired of the defendant if his plea was voluntary to which the defendant replied that it was and that he understood what was meant by voluntary. The Court then asked the defendant if any one had forced or coerced the defendant to enter such a plea to which the defendant replied "No". (Tr. of March 14, 1977, 4-6).

The record further shows that at the hearing held April 13, 1977 the defendant appeared with his counsel, Richard Hoffman; that Officer Bob Horn, Police Officer for the City of Tulsa, testified that he gave the polygraph examination to the defendant on March 30, 1977; that a pretest interview

was conducted at which time the defendant and his counsel and the Assistant District Attorney, Mr. Gillert, were present; that the pretest interview was for the purpose of agreeing on the questions that would be asked during the polygraph test; that only those questions agreed upon were asked during the polygraph test, although not necessarily in the same order; that only he and the defendant were present during the polygraph test; that Officer Horn had requested in the presence of the defendant that defendant's counsel not be in the room with the defendant and Officer Horn at the time the polygraph test was given and that the defendant indicated that there was no reason for defendant's counsel to remain if he were not to be present in the room at the time the polygraph was given. (Tr. 3-7 of April 13, 1977). The record does not reflect any objection by defendant or his counsel to proceeding with the polygraph test without the defendant's counsel being present in the room at the time the polygraph test was administered. The record further reflects that the results of the polygraph examination were adverse to the defendant with regard to the key questions. At the April 13, 1977 hearing the record further reflects the following:

> "THE COURT: Well, I would like to state into the Record that, of course, under the State law -- well, polygraph examinations are not allowed into evidence. This was a kind of unusual situation brought about during plea negotiations. It was my understanding both parties agreed and, in fact, at the suggestion of the defendant he desired to take a polygraph test and if the State agreed that if he had passed the test that they would dismiss the charges, if I remember correctly.
>
> MR. GILLERT: That is correct.
>
> THE COURT: So I think the defendant had everything to gain and nothing to lose based upon that agreement and, of course, I think also and will state into the Record the fact that polygraphs are not used even if both parties consent to the polygraph test. In the trial, the Court cannot allow this in or allow a jury to consider,

you know, the results of the test even if it is by consent but this was an unusual situation that arose during plea negotiations. The defendant had nothing to lose; everything to gain from this and he did plead guilty voluntarily and I made a Record on that at the time knowing what the plea negotiaions were and that the Court would take all circumstances into consideration. I didn't promise one way or the other what I would do based upon whether or not he passed or flunked the test. I made no promise whatsoever. The D.A. did make certain at plea negotiations when I told them if he passed the test -- and it is evidence from this Officer's standpoint that he didn't pass the test. I don't know of any real need for going into detail on the charts that this Officer made. The defendant is not questioning this Officer's qualifications as a polygraph expert; are you?

MR. HOFFMAN: No, we're not at this time as far as his reading of the results actually. Mr. Johnson's contention goes to the fact that he stated in the Record that he wished me to be present at the time of the examination itself and that I was not present and it was my understanding that Mr. Horn did not give polygraph examinations except himself and the person taking the examination. At that point, I asked Mr. Johnson if he wished me to remain in the hall and at that point Mickey said that he didn't see any reason for me to be out in the hall and so I went back to my office. His contention is simply that the bargain wasn't carried out by my not being present and I think that that's been fairly well established to that point and that is the point that he wishes to make; isn't that correct?"

(Tr. of April 13, 1977 7-9).

The record further shows the following comments by the Court:

"THE COURT: I don't remember at the time of the plea, right off the top of my head whether or not there was anything mentioned about counsel being present. If so, I didn't take it at least-- this Court doesn't remember that it was so significant that it was going to be mandatory that Counsel be there during the test. I mean, now, if you could show something of-- if Defense Counsel could show something where they violated this defendant's rights in some way, I would certainly consider that. I don't see how Counsel not being there would be depriving-- I mean, he had everything to gain and nothing to lose, the way I understand the plea negotiation, by taking the test. Certainly, as I indicated earlier, it wasn't a situation where the Court said that you take the test because that is going to be determinative of how I rule in this case. I may or may not have gone along with this plea negotiation even if you had passed the test. I have the discretion of allowing you to withdraw your former plea at that time and have a jury trial to determine the issues in the case, so I didn't indicate that I was going to definitely grant you a suspended sentence in the event

that you passed this test, you know. More than likely, I would have, you know; but that is not mandatory upon the Court. I want to make sure the Record is clear in that regard. And you are not being sentenced because, Mr. Johnson, you failed the test. I want you to understand that and I think that I have made the Record clear. As far as I was concerned I would have been satisfied had there not been a test. In fact, under the Statutes of the State of Oklahoma it is not even admissible in the trial to the Court or anything and this was an opportunity to get the case dismissed. You had everything to gain when you passed the test and had this officer that gave you that test stated to the Court that you would have passed it; more than likely this Court would have followed the recommendation of the District Attorney's Office and dismissed the case; but I'm not sentencing you on the basis that you flunked the test. I want to make the Record clear on that. Now, how much time does the State request at this time?"

(Tr. of April 13, 1977, 18-20).

In the Order Denying Writ of Certiorari the Oklahoma Court of Criminal Appeals stated:

> "Petitioner now asserts that the trial Court erred in not allowing him to withdraw his plea of nolo contendere because of our holding in Fulton v. State, Okl.Cr., 541 P.2d 871 (1975) wherein we held that evidence of polygraph examinations should not be used for 'any purpose.'
>
> "We are of the opinion that our holding in Fulton, supra, is not controlling in the instant case. In Fulton, supra, evidence of the result of a polygraph examination was admitted into evidence at a jury trial. In the instant case the trial court was informed of the result of the polygraph examination at Petitioner's request after having previously entered a plea of nolo contendere. The trial court specifically informed Petitioner that 'you are not being sentenced because Mr. Johnson, you failed the test. I want you to understand that and I think I have made the record clear. As far as I am concerned I would have been satisfied had there not been a test.' [Tr. 19] The Supreme Court of this State has previously held that the admission of incompetent evidence in a cause tried to the court is not prejudicial where it is apparent that the court disregarded such eviddnce. See, Hartford Fire Ins. Co. v. Smith, 141 Okl. 90, 284 P. 624 (1930)."

Petitioner claims that he should have been permitted to withdraw his plea of nolo contendere because his counsel was not present in the testing room during the time the polygraph test was administered. As pointed out above no

objection was made by the defendant or the defendant's counsel at the time the polygraph was administered to excluding defendant's counsel from the room where the polygraph test was given. Additionally, the record does not indicate that defendant was prejudiced in any way by the fact that his counsel was not present during the administering of the polygraph test particularly where the record shows that the pretest procedures were agreed upon by defendant and his counsel and were followed in administering the test. A plea of guilty or nolo contendere is a solemn act on the part of a defendant charged with a crime and is not to be disregarded because of belated misgivings about the wisdom of such plea. United States v. Woosley, 440 F.2d 1280 (8th Cir. 1971); Chaney v. United States, No. 761116 Unreported (10th Cir. filed Jan. 4, 1977).

In this case the record clearly shows that the nolo contendere plea of the defendant was voluntarily entered with a full understanding of the consequences of such plea. See Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973); Boykin v. Alabama, 395 U.S. 238 (1969).

For the reasons stated herein the Petition for Writ of Habeas Corpus should be and is hereby denied.

IT IS SO ORDERED this 15th day of June, 1978.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 77-C-62-B
HAROLD B. HACKENBERGER and DOROTHY J. HACKENBERGER, d/b/a RED CARPET LOUNGE, et al., Defendants.	)	

STIPULATION OF DISMISSAL

COME NOW the United States of America, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma; and David L. Kennedy and Jack L. Merrifield, by and through their attorney, L. Robert Bracken, and herewith stipulate and agree that this action may be dismissed as to Harold B. Hackenberger and Dorothy J. Hackenberger, without prejudice; and as to David L. Kennedy and Jack L. Merrifield, with prejudice. The United States herewith stipulates and agrees that it claims no further interest in the personal property described in the Security Agreement attached to the Complaint filed herein.

The parties herewith further stipulate that the Counter Claim filed by David L. Kennedy be dismissed against the United States, with prejudice.

Dated this 15th day of June, 1978.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

L. ROBERT BRACKEN
Attorney for Defendant,
David L. Kennedy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARTHA TAYLOR, individually and as Administratrix of the Estate of David S. Taylor, Deceased,

Plaintiff,

vs

CESSNA AIRCRAFT, a corporation, JED-AIR, INCORPORATED, a corporation, SKYWAYS AIRCREDIT CORPORATION, a corporation, TRANS WEST AIRCRAFT SALES, a corporation, JERRY TIMOTHY, an individual, VEN SAVAGE, an individual, COMMERCIAL CREDIT EQUIPMENT CORP., a corporation, JOSEPH A. GENNITTI, an individual, SOUTHERN AVIATION, INC., a corporation, HAROLD K. BEATY, an individual, LARRY W. FERGUSON, a/k/a LARRY K. FERGUSON, an individual, AMERICAN BANK & TRUST CO., a corporation, R. R. DRAKE a/k/a RENE R. DRAKE, an individual,

Defendants.

No. 78-C-159-C

FILED

JUN 14 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

Now on this 14th day of June 1978, for good cause shown, upon Plaintiff's written application to dismiss, the above styled and numbered cause, only insofar as it pertains to the following Defendants, to-wit:

Jed-Air Incorporated, a corporation
Skyways Aircredit Corporation, a corporation
Trans West Aircraft Sales, a corporation
Jerry Timothy, an individual
Ven Savage, an individual
Commercial Credit Equipment Corp., a corporation
Joseph A. Gennitti, an individual
Southern Aviation, Inc., a corporation
Harold K. Beaty, an individual
Larry W. Ferguson a/k/a Larry K. Ferguson, an individual
American Bank & Trust Co., a corporation
R. R. Drake a/k/a Rene R. Drake, an individual

The Court finds that each of said Defendants as follows should be dismissed, to-wit:

Jed-Air Incorporated, a corporation
Skyways Aircredit Corporation, a corporation
Trans West Aircraft Sales, a corporation
Jerry Timothy, an individual
Ven Savage, an individual
Commercial Credit Equipment Corp., a corporation
Joseph A. Gennitti, an individual

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

Southern Aviation, Inc., a corporation
Harold K. Beaty, an individual
Larry W. Ferguson a/k/a Larry K. Ferguson, an individual
American Bank & Trust Co., a corporation
R. R. Drake a/k/a Rene R. Drake, an individual

and IT IS SO ORDERED.

JUDGE

APPROVED AS TO FORM:

THOMAS S. CREWSON
Attorney for Plaintiff

NEWCOMBE & REDMAN, INC.,

By

Attorneys for Southern Aviation, Inc.

FARMER, WOOLSEY
TIPS & GIBSON
INCORPORATED
ATTORNEYS AT LAW
FIFTH FLOOR
MID-CONTINENT BLDG.
TULSA,
OKLAHOMA 74103
(918) 585-1181

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILL WAYBOURN and DON EAST, d/b/a East-Waybourn Distributing, Plaintiffs,	)	
-vs-	)	No. 77-C-446-C
SYKES FLOORING CO., INC., Defendant.	)	

FILED

JUN 13 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

Upon the Stipulation of Dismissal of the parties to the above styled and numbered action,

It is hereby ordered this action be dismissed without prejudice to either party, with each party to pay their own costs.

The Court Clerk is hereby authorized and directed of record in the above styled and numbered action this dismissal without prejudice dated this 13th day of June, 1978.

/s/ H. Dale Cook
JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

ATTORNEYS AT LAW
2406 FOURTH NATIONAL BANK BUILDING
TULSA, OKLAHOMA 74119
AREA CODE 918
585-8161

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROY H. BETHARD,

Plaintiff,

vs.

WILLIAMS RODDA ADAMS,

Defendant.

77-C-345-B

FILED

JUN 9 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The instant litigation was commenced in this Court on August 10, 1977, by the plaintiff. On November 10, 1977, the summons issued in this case was filed, and reflected that service was not had on the defendant, Williams Rodda Adams.

On May 26, 1978, this case was set on the disposition docket before the Magistrate, and counsel for the plaintiff, Bill Smalley, did not appear. The case was set for disposition for failure to prosecute. The Magistrate has recommended to this Court that the case be dismissed for failure to prosecute.

The Court has carefully perused the entire file, and, being fully advised in the premises, finds that this case should be dismissed for failure to prosecute. Link v. Wabash Railroad Co., 370 U.S. 626 (1962); Moore's Federal Practice, Volume 5, ¶41.11[2]; Stanley v. Continental Oil Company, decided June 23, 1976 (10th Cir., No. 75-1613).

IT IS, THEREFORE, ORDERED that this cause of action and complaint be and the same are hereby dismissed for failure to prosecute.

ENTERED this 9th day of June, 1978.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and RAY K. FACTORY, Revenue Officer, Internal Revenue Service, Petitioners,	)	
vs.	)	
RUTHE O. JONES, Respondent.	)	No. 78-C-197-C

ORDER DISCHARGING RESPONDENT
AND DISMISSAL

On this 9th day of June, 1978, Petitioners' Motion To Discharge Respondent And For Dismissal came for hearing and the Court finds that Respondent has now complied with the Internal Revenue Service Summons served upon her March 3, 1978, that further proceedings herein are unnecessary and that the Respondent, Ruthe O. Jones, should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Respondent, Ruthe O. Jones, be and she is hereby discharged from any further proceedings herein and this cause of action and Complaint are hereby dismissed.

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

MAPCO INC., a Delaware Corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 77-C-182-C
	)	
W. W. MEANS, Judge of the District Court of Tulsa Coutny, and COLORADO INTERSTATE GAS COMPANY, a Delaware Corporation,	)	
	)	
Defendants.	)	

FILED

JUN - 8 1978

U. S. DISTRICT COURT

ORDER

Having considered the Joint Stipulation of Dismissal filed herein, the Court orders that this action be dismissed without prejudice.

/S/ W. Dale Cook

District Judge

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD GERMAN and JANONE ELAINE GERMAN, husband and wife, Plaintiffs,	)	
vs.	)	NO. 78-C-84-B
JOE MEYER, d/b/a BIRMINGHAM APARTMENTS, Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to settlement agreement between the parties, with respect to any claim or complaints that they have made or might have made, whether such claims arise directly or indirectly from any of the acts or transactions mentioned in any of the pleadings, the plaintiffs hereby dismiss their action against the defendants with prejudice against the filing of any new claim or complaint against the defendants. Defendants agree to such dismissal. The stipulation of dismissal is filed pursuant to Rule 41(a) 1(ii) of the Federal Rules of Civil Procedure.

Fred C. Cornish
Attorney for Plaintiffs

John C. Harrington
Attorney for Defendants

APPROVED:

Richard German, Plaintiff

Janone Elaine German, Plaintiff

Joe Meyer, Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	NOS. 78-C-46-B
	)	77-CR-56
CARL EDWARD BRILL, Movant.	)	

O R D E R

The Court has for consideration a motion pursuant to 28 U.S.C. § 2255 filed pro se, in forma pauperis, by Carl Edward Brill. The cause has been assigned civil Case No. 78-C-46-B and docketed in his criminal Case No. 77-CR-56.

Movant is a prisoner in the Federal Correctional Institution, Fort Worth, Texas, pursuant to conviction upon his plea of guilty to Count One of a two count indictment charging possession of stolen mail in violation of 18 U.S.C. § 1708. Count Two was dismissed in accordance with a plea agreement. On September 8, 1977, Movant was sentenced to 24 months imprisonment pursuant to 18 U.S.C. § 4205(b)(2).

Movant in his § 2255 motion demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution of the United States of America. In particular, Movant claims that:

1. He was denied his right to appeal in that he was drunk, on medication for a broken leg, and he did not understand the situation and it was not explained to him by his Court-appointed counsel.

2. His Court-appointed attorney made no effort to obtain the witnesses who were present when Movant in good faith received the check involved in the charges against him, rather the attorney advised him to enter a plea of guilty.

3. He was mentally incapable of understanding the charges and consequences of his plea, which were not properly explained to him, in that at the time of his arrest he had been drunk for eight months and taking medication for his broken leg.

4. The sentence was unfair and unjust equating with cruel and unusual punishment.

5. The Parole Commission failed to give proper consideration to his case, and he is receiving no medical treatment for his drinking problem.

The Court remembers the plea and sentence of Carl Edward Brill, and has carefully reviewed the motion, response and file. Being fully advised in the premises, the Court finds that an evidentiary hearing is not required and the § 2255 motion is without merit and should be denied.

Movant's plea of guilty on August 23, 1977, was in full conformity with Rule 11, Federal Rules of Criminal Procedure. The charge and maximum possible sentence were explained to him. It was carefully determined that his plea of guilty was entered of his own free choice, without force, threat or promise. Movant admitted under oath that he had possessed a check knowing that it had been stolen from the mail. The Court was informed and aware that the cast had been removed from his broken leg that morning and considered his demeanor during his plea. Movant was at all times in possession of his faculties, able to understand and respond to the Court's questions, he was alert and gave no indication of dull-wittedness, incoherence or intoxication. He did fail to appear for sentencing on September 6, 1977. Bond was revoked and he was held in custody at the Tulsa County Jail, where he was kept in an alcohol free environment to recover from his inebriation, and was before the Court, sober, for sentencing on September 8, 1977, as he had been at his plea on August 23, 1977. Movant's plea of guilty was free and knowing, it was competently and voluntarily entered in full compliance with Rule 11 and constitutional safeguards as clearly appears of record and from this Court's memory of the proceedings. His valid plea of guilty waives all prior non-jurisdictional defects. Acuna v. Baker, 444 F.2d 59 (10th Cir. 1969); United States v. Nooner, 565 F.2d 633 (10th Cir. 1977).

Further, as appears from the record, defense counsel bargained on Movant's behalf, and Movant entered his plea to only Count One of the indictment and Count Two was dismissed on the Government's motion. Counsel stated on the record that he had had several long conferences in his law office with the Movant. The Court is familiar with the work of defense counsel and knows him to be an able and experienced attorney who has represented enumerable criminal defendants. The Court was under no obligation on a plea of guilty to advise the Movant of appeal procedures, and counsel was under no obligation to appeal absent a specific request from his client to do so. Movant makes no claim that he requested an appeal. He stated on the record, under oath that he was satisfied with his attorney. He must assume the risk of ordinary error in either his or his attorney's assessment of the law and facts. McMann v. Richardson, 397 U. S. 759 (1970). A plea of guilty is a solemn act

not to be disregarded because of belated misgivings about the wisdom of the same. United States v. Woosley, 440 F.2d 1280 (8th Cir. 1971); Chaney v. United States, No. 76-1116 unreported (10th Cir. filed Jan. 4, 1977). It is therefore clear that Movant's first three claims in his § 2255 motion are without merit.

The sentence imposed was well within the maximum provided by law. Such a sentence is not subject to attack on the ground of severity in a direct appeal or a collateral proceeding. Randall v. United States, 324 F.2d 726 (10th Cir. 1963).

Movant's final claim is that the Parole Commission failed to give proper consideration to his case, and he is receiving no medical treatment for his drinking problem. Such issue does not challenge the validity of his plea, conviction and sentence in this Court. Rather, he challenges the Parole Commission's application of its guidelines to his case and that the institution is not providing "medical" treatment for his alcoholism, both of which are administrative responsibilities unrelated to the sentencing process. His appropriate remedy on this issue is to file a habeas corpus petition pursuant to 28 U.S.C. § 2241 in the United States District Court having jurisdiction over his place of confinement, and that only after available administrative remedies have first been exhausted. See, Rogers v. United States, No. 76-1122 unreported (10th Cir. filed Nov. 2, 1976); Weiser v. United States, No. 76-1589 unreported (10th Cir. filed Feb. 10, 1977), which cases are applicable to establish the appropriate procedure in regard to the final issue raised to this Court herein although they deal with a different factual claim than here presented.

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of Carl Edward Brill be and it is hereby overruled and the case is dismissed.

Dated this 8th day of June, 1978, at Tulsa, Oklahoma.

Allen E. Barrow

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL WM. POLIN and MARSHA POLIN, Plaintiffs,	)	
vs.	)	No. 70-C-36-B
DUN & BRADSTREET, INC., a Delaware Corporation, Defendant.	)	

FILED

JUN - 7 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

In conformity with the Order entered by Royce H. Savage, Special Master, on June 7, 1978, in the above-entitled cause sustaining the Motion of the Defendant for Summary Judgment, judgment is hereby entered in favor of the defendant and against the plaintiffs.

DATED this 7th day of June, 1978.

Allen E. Barrow

CHIEF JUDGE OF THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
OKLAHOMA.

J.C.

FILED

JUN - 7 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CNA INSURANCE COMPANY,

Plaintiff,

vs.

AFFILIATED FIRE AND MARINE INSURANCE CO.,

Defendant.

Case No. 78-C-241-B

Notice of

DISMISSAL WITHOUT PREJUDICE

Comes now the Plaintiff, CNA INSURANCE COMPANY, by and through its attorney, WILLIAM D. HUNT, and dismisses this cause without prejudice to its refiling within the statutory period of time allowed by the laws of the State of Oklahoma.

Wm. D. Hunt

WILLIAM D. HUNT
Attorney for
CNA INSURANCE COMPANY

CERTIFICATE OF MAILING

I, Wm. D. Hunt, hereby certify that on the 7 day of June, 1978, I mailed a true and correct copy of the above Dismissal to R. Senberg attorney for Defendant, with proper postage thereon prepaid.

Wm. D. Hunt
Wm. D. Hunt

6

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

SMITH POTTING SOIL COMPANY,)
)
Plaintiff,)
-vs-)
) No. 77-C-488-B
UNIVERSAL PACKAGING, INC.,)
)
Defendant.)

Notice of
DISMISSAL WITH PREJUDICE

Plaintiff, Smith Potting Soil Company, and Defendant, Universal Packaging, Inc., hereby stipulate by and through their respective attorneys that all claims of Plaintiff against the Defendant may be dismissed with prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

So stipulated this 1st day of June, 1978.

DAVID L. NOSS, INC.

Patrick O'Connor

Patrick O'Connor
1000 Thompson Building
Tulsa, Oklahoma 74103
Attorneys for Plaintiff,
Smith Potting Soil Company

BRACEWELL AND PATTERSON

William Fred Hagans

William Fred Hagans
2900 South Tower Pennzoil Place
Houston, Texas 77002
Attorneys for Defendant,
Universal Packaging, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN DEERE COMPANY, a corporation,	)	
Plaintiff,	)	
vs.	)	No. 78-C-182-B
JOE SHERRY,	)	
Defendant.	)	

APPLICATION TO DISMISS
WITHOUT PREJUDICE

COMES NOW plaintiff and applies to this Court for an order permitting it to dismiss this action without prejudice to the filing of another concerning the same subject matter.

In support of this application, plaintiff shows the Court that the defendant, Joe Sherry, has paid an amount to bring the note indebtedness sued upon herein current, and that plaintiff, therefore, desires to dismiss this action without prejudice to the filing of another concerning the same subject matter should a default hereafter occur.

WHEREFORE, plaintiff prays that this Court enter an order dismissing this action without prejudice to the filing of another concerning the same subject matter.

John C. Harrington, Jr.
LYTLE SOULE & EMERY
2210 First National Center
Oklahoma City, Oklahoma 73102
405/235-7471
Attorneys for Plaintiff

FILED

JUN 7 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL OF ACTION WITHOUT PREJUDICE TO THE FILING OF ANOTHER CONCERNING THE SAME SUBJECT MATTER

NOW, on this 7 day of June, 1978, plaintiff having applied to the Court for an order dismissing this action without prejudice and the Court being fully advised in the premises finds that said application should be granted.

IT IS THEREFORE ORDERED that this action be, and the same is hereby dismissed without prejudice to the right of plaintiff to bring a future action concerning the same subject matter.

Allen E. Barrow
United States District Judge

APPROVAL:

John C. Harrington, Jr.
LYTLE SOULE & EMERY
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the ~~31st~~ 1st day of ~~May~~ June, 1978, I mailed a true and correct copy of the above and foregoing, APPLICATION TO DISMISS WITHOUT PREJUDICE, postage prepaid, to: Mr. Joe Sherry, Route 2, Box 49, Broken Arrow, Oklahoma 74012

John C. Harrington, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY WAYNE THOMAS,

Plaintiff,

-vs-

DAVID YOUNG, DISTRICT ATTORNEY; THE HONORABLE STREETER SPEAKMAN, JR.; BRICE COLEMAN, SHERIFF OF CREEK COUNTY, OKLAHOMA and THE STATE OF OKLAHOMA,

Defendants.

No. 77-C-531-C

FILED

JUN 6 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

NOW on this 2nd day of June, 1978, there comes before this Court the application of the plaintiff to dismiss the above cause without prejudice as to the defendant, Brice Coleman, and the Court having reviewed said application and the court file finds said dismissal should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the instant action be and the same is hereby dismissed against the defendant, Brice Coleman, without prejudice.

H. Dale Cook

JUDGE H. DALE COOK

CERTIFICATE OF MAILING

I, Joseph L. Hull, III, hereby certify that I mailed a true and correct copy of the above and foregoing Order to Mr. Paul Crowe, Assistant Attorney General for the State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, & Mr. David Young, District Attorney, Creek County, Sapulpa, Oklahoma, with postage prepaid thereon this__ day of June, 1978.

JOSEPH L. HULL, III

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

WGVI FINANCIAL ADVISORS, INC., a corporation,	)	
Plaintiff,	)	
vs.	)	No. 77-C-385-C
PACIFIC BAY CONSTRUCTION CORPORATION, a corporation,	)	
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

Plaintiff having moved for an order directing the Clerk of this Court to enter the Default of the Defendant, Pacific Bay Construction Corporation, in this action and granting to the Plaintiff judgment against the said Pacific Bay Construction Corporation in the amount of $50,000, the amount demanded in the Complaint herein, with interest at the rate of 10% per annum from the 5th day of June, 1978, together with Plaintiff's costs and disbursements, the Court having heard the argument of counsel, and due deliberation having been had, it is

ORDERED, that the Clerk of this Court enter the Default of the Defendant, Pacific Bay Construction Corporation in this action, and it is further

ORDERED, that a judgment be made and entered herein in favor of the Plaintiff against the Defendant, Pacific Bay Construction Corporation, by reason of the matters and things alleged by the Plaintiff in its Complaint against the Defendant, Pacific Bay Construction Corporation, in the amount of $50,000, together with interest at the rate of 10% per annum from the 5th day of June, 1978, and costs of this action in the sum of $15.00.

Dated: June 5, 1978.

/s/ H. Dale Cook
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 78-C-38-C
BETTY LEE GRAY, et al., Defendants.	)	

STIPULATION OF DISMISSAL

COME NOW the United States of America, Plaintiff, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the County Treasurer, Tulsa County, and the Board of County Commissioners, Tulsa County, by and through their attorney, and herewith stipulate and agree that this action may be dismissed, without prejudice.

Dated this 5th day of June, 1978.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

Assistant District Attorney
Attorney for County Treasurer,
Tulsa County, and Board of County
Commissioners, Tulsa County

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

PETROWELL, INC.; PETROWELL ASSOCIATES I and PETROWELL ASSOCIATES II, Plaintiffs,	)	
vs.	)	No. 78-C-76-C
GENE C. CARPENTER and CAR-CON DEVELOPMENT, INC., Defendants.	)	

Notice of DISMISSAL WITHOUT PREJUDICE BY PETROWELL ASSOCIATES I AND PETROWELL ASSOCIATES II

COME NOW the plaintiffs, Petrowell Associates I and Petrowell Associates II, by their attorney of record, Richard T. Sonberg, and voluntarily dismiss that complaint filed herein against the defendants, without prejudice.

This dismissal shall not affect the complaint filed herein by the other plaintiff, Petrowell, Inc.

SONBERG AND WADDEL

By Richard T. Sonberg
Richard T. Sonberg

907 Philtower Building
Tulsa, Oklahoma 74103

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Dismissal Without Prejudice was mailed, postage prepaid, on this 5 day of June, 1978, to Stan P. Doyle, Attorney for Defendants, 1414 South Galveston, Tulsa, Oklahoma 74127.

Richard T. Sonberg
Richard T. Sonberg

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 31 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

VERNON COOPER,

Plaintiff,

vs

SIPES FOOD MARKETS, INC.,

Defendant.

No. 77-C-154-C

STIPULATION FOR DISMISSAL

It is hereby stipulated by Vernon Cooper, plaintiff, and Hugh V. Rineer, attorney for plaintiff, and Sipes Food Markets, defendant, by Frederick N. Schneider, III, its attorney, that the above entitled action be dismissed with prejudice without costs to either party.

Dated this 30 day of 5-78, 1978.

Vernon Cooper
Vernon Cooper, Plaintiff

Hugh V. Rineer
Hugh V. Rineer
Attorney for Plaintiff

FILED

JUN 2 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Frederick N. Schneider III
Frederick N. Schneider, III
Attorney for Defendant, Sipes Food Markets, Inc.

ORDER

It Appearing to the Court that the parties in the above entitled cause have stipulated for dismissal, NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the above entitled cause be and the same is hereby dismissed without costs to either party and with prejudice to the plaintiff.

Dated this 2nd day of June, 1978.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

RAY MARSHALL, Secretary of Labor, United States Department of Labor, Plaintiff, v. WILBERT E. COLLINS, doing business as OSAGE HIGHLANDER LAUNDRY, Defendant.	Civil Action No. 77-C-405-C

JUDGMENT

Plaintiff has filed his complaint against Defendant Wilbert Collins, doing business as Osage Highlander Laundry. Thereafter, Plaintiff and Defendant announced that they have reached an agreement in this matter, and it appearing to the Court that Plaintiff and Defendant are in agreement that this judgment should be entered, it is therefore,

OREDERED, ADJUDGED and DECREED that Defendant, his agents, servants, employees and those persons in active concert or participation with him are permanently enjoined and restrained from violating the provisions of Sections 6, 7, 11 and 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, et seq.), hereinafter referred to as the Act, in any of the following manners:

I.

Defendant shall not, contrary to the provisions of Section 6 of the Act, pay any employees engaged in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, wages at rates less than the rates required by Section 6 of the Act.

II.

Defendant shall not, contrary to the provisions of Section 7 of the Act, employ any employee engaged in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than 40 hours unless Defendant compensates such employee for employment in excess of 40 hours in a workweek at a rate not less than one and one-half times the regular rate at which such employee is employed.

III.

Defendant shall not, contrary to the provisions of Section 11(c) of the Act, fail to make, keep and preserve the records required by the Code of Federal Regulations, Title 29, Part 516.

It is further ORDERED, that Defendant is enjoined and restrained from withholding payment of overtime compensation and minimum wages in the total amount of $3,000.00, which the Court finds to be due under the Act to Defendant's employees, named in Attachment "A" hereto, which by reference is made a part hereof, together with interest at nine percent per annum on the unpaid balance. The provisions of this order shall be deemed satisfied when the defendant delivers to the plaintiff his cashier or certified checks, payable to "Employment Standards Administration - Labor," in the amounts and the time herein set forth:

> Payment of $3,000.00, plus interest, in 27 equal consecutive monthly installments of $123.15, with the first installment being due and payable on or before June 1, 1978, and the remaining installments being due and payable on or before the same day of each succeeding month thereafter until all installments have been paid.

It is further ORDERED, that Plaintiff, upon receipt of such certified or cashier's check from the defendant, shall

promptly proceed to make distribution, less income tax and social security withholdings, to Defendant's employees named herein in the amounts indicated, or to the legal representative of any deceased person so named. If, after making reasonable and diligent efforts to distribute such amounts to the person entitled thereto, Plaintiff is unable to do so because of inability to locate a proper person, or because of a refusal to accept payment by any such person, Plaintiff, pursuant to 28 USC Section 2041, shall deposit such funds with the Clerk of this Court. Any such funds may be withdrawn for payment to a person entitled thereto upon order of this Court.

DATED this 2nd day of June, 1978.

UNITED STATES DISTRICT JUDGE

Entry of this order is consented and agreed to:

CARIN ANN CLAUSS
Solicitor of Labor

RONALD M. GASWIRTH
Regional Solicitor

WILLIAM E. EVERHEART
Counsel for Employment Standards

MARIGNY A. LANIER
Attorney

Attorneys for Plaintiff

MAYNARD I. UNGERMAN
Attorney for Defendant

SOL Case No. 04380

ATTACHMENT "A"

Dorothy Whinery

Viory Armstrong

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIS UILLIS ARNOLD, WANDA LOUISE ARNOLD, WILLIE TROY GREENWALT, ETHEL ANN GREENWALT, CAL JOHNSON, WILLA JOHNSON a/k/a WILLIA WILLIS JOHNSON, if living, or if not, her unknown heirs, assigns, executors, and administrators, NATIONAL BANK OF TULSA now BANK OF OKLAHOMA, a Corporation, CHARLES H. OSTRANDER, WENDELL SUGG, JR., OWASSO LUMBER COMPANY, a Corporation, MAX KESSLER, AMERICAN STATE BANK, a Corporation, JOHN F. CANTRELL, County Treasurer, Tulsa County, Oklahoma, OKMULGEE PLUMBING COMPANY, a Corporation, CHILDREN'S MEDICAL CENTER, OKLAHOMA TAX COMMISSION, OKLAHOMA EMPLOYMENT SECURITY COMMISSION, ANESTHESIA ASSOCIATES, INC., PAUL CULL d/b/a HOME SERVICE CLUB NORTH, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, EAGLE MATERIAL HANDLING, INC., BOISE CASCADE CORPORATION, FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, a Corporation, EMPIRE PLUMBING SUPPLY COMPANY, INC., BALBOA INSURANCE COMPANY, and FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendants.	)	CIVIL ACTION NO. 77-C-314-C

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 2nd day of June, 1978, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma; and, the Defendant, Oklahoma Employment Security Commission, appearing by its attorney, Deborah Brom Kovac; the Defendant, Oklahoma Tax Commission, appearing by its attorney, Clyde Fosdyke; the Defendant, Owasso Lumber Company, a Corporation, appearing by its attorney, Steven M. Harris; the Defendant, American State Bank, a State Banking Corporation, appearing by its attorney,

Waldo E. Jones, II; the Defendants, John F. Cantrell, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, appearing by their attorney, Andrew B. Allen, Assistant District Attorney; the Defendant, National Bank of Tulsa, now Bank of Oklahoma, a National Banking Association, appearing by its attorney, M.W. Kriegel, Jr.; the Defendant, Federal National Mortgage Association, appearing by its attorney, Susan Hill Shanbaum; the Defendant, First National Bank and Trust Company of Tulsa, a National Banking Association, appearing by its attorney, Paul B. Naylor; the Defendant, Boise Cascade Corporation, appearing by its attorney, Charles S. Holmes; the Defendant, Okmulgee Plumbing Company, a Corporation, appearing by its attorney, Steven M. Harris; the Defendant, Paul Cull d/b/a Home Service Club North, appearing pro se; the Defendant, Willa Johnson a/k/a Willia Willis Johnson, if living, or if not, her unknown heirs, assigns, executors, and administrators, appearing by Jack Winn, Administrator; and, the Defendants, Willis Uillis Arnold, Wanda Louise Arnold, Willie Troy Greenwalt, Ethel Ann Greenwalt, Cal Johnson, Charles H. Ostrander, Wendell Sugg, Jr., Max Kessler, Children's Medical Center, a non-profit organization, Anesthesia Associates, Inc., Eagle Material Handling, Inc., Empire Plumbing Supply Company, Inc., and Balboa Insurance Company, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Willis Uillis Arnold, Wanda Louise Arnold, Willie Troy Greenwalt, Ethel Ann Greenwalt, and Balboa Insurance Company, were served by publication as shown on the Proof of Publication filed herein; that Defendants, Oklahoma Tax Commission and Oklahoma Employment Security Commission, were served with Summons, Complaint, and Amendment to Complaint on July 22, 1977, and October 7, 1977, respectively; that Defendants, John F. Cantrell, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, were served with Summons, Complaint, and Amendment to Complaint, on July 22, 1977, and October 11, 1977,

respectively; that Defendant, Okmulgee Plumbing Company, a Corporation, was served with Summons, Complaint, and Amendment to Complaint on July 22, 1977, and October 26, 1977, respectively; that Defendants, National Bank of Tulsa, now Bank of Oklahoma, a National Banking Association, Charles H. Ostrander, Wendell Sugg, Jr., Max Kessler, Children's Medical Center, a non-profit organization, and Anesthesia Associates, Inc., were served with Summons, Complaint, and Amendment to Complaint on July 25, 1977, and October 6, 1977, respectively; that Defendants, Cal Johnson and Owasso Lumber Company, a Corporation, were served with Summons, Complaint, and Amendment to Complaint on August 1, 1977, and October 6, 1977, respectively; that Defendant, American State Bank, a State Banking Corporation, was served with Summons, Complaint, and Amendment to Complaint on August 9, 1977, and October 6, 1977, respectively; that Defendants, Eagle Material Handling, Inc., Boise Cascade Corporation, First National Bank and Trust Company of Tulsa, a National Banking Association, and Empire Plumbing Supply Company, Inc., were served with Summons, Complaint and Amendment to Complaint on October 6, 1977; that Defendant, Federal National Mortgage Association, was served with Summons, Complaint, and Amendment to Complaint on October 7, 1977; that Defendant, Paul Cull d/b/a Home Service Club North, was served with Summons, Complaint, and Amendment to Complaint on November 4, 1977; and, that Defendant, Willa Johnson a/k/a Willia Willis Johnson, if living, or if not, her unknown heirs, assigns, executors, and administrators, was served with Summons, Complaint, and Amendment to Complaint on March 9, 1978; all as appears on the United States Marshal's Service herein.

It appearing that the Defendant, Oklahoma Employment Security Commission, has duly filed its Answer and Cross-Petition herein on August 2, 1977; that Defendant, Oklahoma Tax Commission, has duly filed its Answer and Cross-Petition herein on August 8, 1977; that Defendant, Owasso Lumber Company, has duly filed its Answer herein on August 11, 1977; that Defendant, American State Bank, a State Banking Corporation, has duly filed its Disclaimers

herein on August 22, 1977, and October 14, 1977; that Defendants, John F. Cantrell, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, have duly filed their Answers herein on August 22, 1977; that Defendant, National Bank of Tulsa now Bank of Oklahoma, a National Banking Association, has duly filed its Answer and Cross-Petition herein on October 17, 1977; that Defendant, Federal National Mortgage Association, has duly filed its Disclaimer herein on October 18, 1977; that Defendant, First National Bank and Trust Company of Tulsa, a National Banking Association, has duly filed its Answer and Cross-Petition herein on October 19, 1977; that Defendant, Boise Cascade Corporation, has duly filed its Answer and Cross-Claim herein on October 26, 1977; that Defendant, Okmulgee Plumbing Company, a Corporation, has duly filed its Answer herein on November 8, 1977; that Defendant, Paul Cull d/b/a Home Service Club North, has duly filed his Answer and Disclaimer herein on November 22, 1977; that Defendant, Willa Johnson a/k/a Willia Willis Johnson, if living, or if not, her unknown heirs, assigns, executors, and administrators, has duly filed her Disclaimer herein on March 13, 1978; and, that Defendants, Willis Uillis Arnold, Wanda Louise Arnold, Willie Troy Greenwalt, Ethel Ann Greenwalt, Cal Johnson, Charles H. Ostrander, Wendell Sugg, Jr., Max Kessler, Children's Medical Center, a non-profit organization, Anesthesia Associates, Inc., Eagle Material Handling, Inc., Empire Plumbing Supply Company, Inc., and Balboa Insurance Company, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Three (3), Block Two (2), SUBURBAN ACRES FOURTH ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Willis Uillis Arnold and Wanda Louise Arnold, did, on the 18th day of October, 1963, execute and deliver to the Administrator of Veterans Affairs, his successors in such office, their mortgage and mortgage note in the sum of $9,100.00 with 5 1/4 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Willie Troy Greenwalt and Ethel Ann Greenwalt, were the grantees in a deed from Defendants, Willis Uillis Arnold and Wanda Louise Arnold, dated March 4, 1974, filed March 4, 1974, in Book 4108, Page 976, records of Tulsa County, wherein Defendants, Willie Troy Greenwalt and Ethel Ann Greenwalt, assumed and agreed to pay the mortgage indebtedness being sued upon herein.

The Court further finds that Defendants, Willis Uillis Arnold, Wanda Louise Arnold, Willie Troy Greenwalt, and Ethel Ann Greenwalt, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $6,783.80 as unpaid principal with interest thereon at the rate of 5 1/4 percent per annum from September 1, 1976, until paid, plus the cost of this action accrued and accruing.

The Court further finds that Oklahoma Employment Security Commission is entitled to judgment against Cal Johnson d/b/a Cal Johnson Real Estate Company in the amount set out in its Answer and Cross-Petition, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Oklahoma Tax Commission is entitled to judgment against Cal Johnson in the amount set out in its Answer and Cross-Petition, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Owasso Lumber Company, a Corporation, is entitled to judgment against Cal Johnson in the amount set out in its Answer, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Cal Johnson and Willa Johnson the sum of $ 230.00 plus interest according to law for personal property taxes for the year(s) 1994-95 and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that National Bank of Tulsa, now Bank of Oklahoma, a National Banking Association, is entitled to judgment against Cal Johnson in the amount set out in its Answer and Cross-Petition, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that First National Bank and Trust Company of Tulsa, a National Banking Association, is entitled to judgment against Cal Johnson in the amount set out in its Answer and Cross-Petition, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Boise Cascade Corporation is entitled to judgment against Cal Johnson in the amount set out in its Answer and Cross-Claim, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Okmulgee Plumbing Company, a Corporation, is entitled to judgment against Cal Johnson in the amount set out in its Answer, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Willis Uillis Arnold, Wanda Louise Arnold, Willie Troy Greenwalt, and Ethel Ann Greenwalt, in rem, for the sum of $6,783.80 with interest thereon at the rate of 5 1/4 percent per annum from September 1, 1976, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Oklahoma Employment Security Commission have and recover judgment, in rem, against the Defendant, Cal Johnson d/b/a Cal Johnson Real Estate Company, in the amount set out in its Answer and Cross-Petition, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Oklahoma Tax Commission have and recover judgment, in rem, against the Defendant, Cal Johnson, in the amount set out in its Answer and Cross-Petition, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Owasso Lumber Company, a Corporation, have and recover judgment, in rem, against the Defendant, Cal Johnson, in the amount set out in its Answer, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Cal Johnson and Willa Johnson for the sum of $ 230 00 as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that National Bank of Tulsa, now Bank of Oklahoma, a National Banking Association, have and recover judgment, in rem, against the Defendant, Cal Johnson, in the amount set out in its Answer and Cross-Petition, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that First National Bank and Trust Company of Tulsa, a National Banking Association, have and recover judgment, in rem, against the Defendant, Cal Johnson, in the amount set out in its Answer and Cross-Petition, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Boise Cascade Corporation, have and recover judgment, in rem, against the Defendant, Cal Johnson, in the amount set out in its Answer and Cross-Claim, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Okmulgee Plumbing Company, a Corporation, have and recover judgment, in rem, against the Defendant, Cal Johnson, in the amount set out in its Answer, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Charles H. Ostrander, Wendell Sugg, Jr., Max Kessler, Children's Medical Center, a non-profit organization, Anesthesia Associates, Inc., Eagle Material Handling, Inc., Empire Plumbing Supply Company, Inc., Balboa Insurance Company, and Cal Johnson.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding

him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them, and all persons claiming under them since the filing of the Complaint herein, be and they are forever barred and foreclosed of any right, title, interest, or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED:

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Assistant United States Attorney

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Oklahoma Employment Security
Commission

CLYDE FOSDYKE
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Oklahoma Tax Commission

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